

Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process

MARK R. BROWN*

Over the course of the last generation, a growing number of states have authorized (either de facto or de jure) warrantless rescues of children. Summary removal is proper as long as one could reasonably believe the child has been, or might be, abused. Child abuse is a categorical, constant emergency. Time and circumstances are irrelevant. Federal courts have split over the constitutionality of this practice. The Second, Ninth, and Tenth Circuits have concluded that state officials cannot, as a rule, summarily remove children from their parents' care. Instead, in the absence of particular "exigent circumstances," prior judicial authorization is required. The First and Eleventh Circuits, meanwhile, have ruled that traditional Fourth and Fourteenth Amendment standards do not apply to child abuse investigations. Prior judicial authorization is not needed; peculiar exigencies are immaterial. This Article addresses the history, constitutionality, and wisdom of rescuing children from their homes without prior judicial authorization. It argues that Fourth and Fourteenth Amendment limitations, which generally require some sort of prior judicial process, apply to child abuse investigations. Prior judicial process should, thus, only be excused under a traditional "exigent circumstances" exception—only when time and circumstances preclude officials from seeking a warrant or court order.

I. INTRODUCTION

Everyone agrees that abused children should be protected from their abusers. Protection, in turn, often requires that children be physically separated from their natural guardians, who either are guilty of abuse themselves or house the abusers. But how should separation take place? Should it be an immediate rescue? Should judges be asked, ex ante, about the need for and propriety of governmental intervention? Or should executive officials have discretion to act when they believe children are in harm's way?

A common attitude among law enforcement officers is that judges hurt more than they help. The bottom line, they argue, is that judges slow investigations, delay apprehensions, and generally benefit criminals. But for judges' insistence on probable cause, warrants, sworn statements, and other technicalities, more

* Newton D. Baker/Baker & Hostetler Professor of Law, Capital University. Lead counsel in *Doe v. Kearney*, 329 F.3d 1286 (11th Cir. 2003). I thank James K. Green for his tireless efforts litigating the *Doe* case, the ACLU Foundation of Florida, Inc., for its sponsorship, and Capital University for both its generous research grant and for hosting a workshop on this paper. I also thank Angela Upchurch, Mark Strasser, and Kent Marcus for their helpful comments on earlier versions of this work. All errors remain my own.

criminals would be brought to justice. Constitutional restrictions, primarily those found in the Fourth and Fourteenth Amendments, are anathema to law enforcement.

This same view permeates child abuse investigations. Because judges do more harm than good, it is better to avoid judicial process altogether—or at least delay it until after the child is separated from his abusers. Post-deprivation process, the argument goes, is better-suited to the ultimate goal of protecting children. Pre-rescue review risks more abuse.

A significant number of states today embrace this logic. Even when time and circumstances would otherwise permit prior judicial review, these states authorize immediate, warrantless rescues of children believed to have been abused. They employ a categorical presumption that all children in potentially abusive environments face a substantial and immediate risk of harm. Given this risk, judges need not first be consulted. Mistakes can be sorted out later.

Federal courts today have split over the propriety of rescuing children without prior judicial authorization.¹ The Second, Ninth, and Tenth Circuits have concluded that state officials cannot, as a rule, unilaterally remove children from their parents' care. Instead, in the absence of true "exigent circumstances," prior judicial authorization is required.² The First and Eleventh Circuits, meanwhile, have reached a contrary result.³ They have held that traditional Fourth and Fourteenth Amendment limitations do not apply to child abuse investigations.⁴ Consequently, police and social workers can immediately rescue children without bothering to seek judicial assistance. Time and circumstances are irrelevant.

This Article addresses the constitutionality and wisdom of rescuing children from their homes without prior judicial authorization. The Fourth and Fourteenth Amendments generally require that significant governmental invasions into people's lives be preceded by some form of process.⁵ The thought (and hope) is that by testing the credibility of the government's actions beforehand, prior process will avert mistakes and otherwise avoid unnecessary invasions. While this process need not always be formal, for important personal interests, like privacy in one's home, the Court has ordinarily required some level of judicial oversight.⁶ My thesis is that one's family, being at least as important as one's home, ought to receive similar protections.

Justifying this conclusion is not a simple task. Students know the Fourth Amendment admits numerous exceptions and, viewed as a whole, makes little sense. The same goes for the procedural protections found in the Fourteenth

¹ See *infra* notes 132–78 and accompanying text.

² See *infra* notes 140–78 and accompanying text.

³ See *infra* notes 93–138 and accompanying text.

⁴ See *infra* notes 93–138 and accompanying text.

⁵ See *infra* notes 44–46 and accompanying text.

⁶ See *infra* notes 525–38 and accompanying text.

Amendment's Due Process Clause. In particular, those suspected of criminal offenses—children included—can be arrested outside their homes without warrants.⁷ Children, as well as adults, can be temporarily detained, without prior court order, when reasonably believed to be dangerous to themselves or others.⁸ Why should temporary rescues be treated differently?

Answering these objections requires tackling several related subjects, including the laws of arrest, delinquency, and civil commitment. I argue that inconsistent applications of constitutional principles in these areas can largely be explained by differing histories and policies. I consequently devote a large part of this Article to comparing the law of rescue and removal with that of arrest and commitment. Toward this end, Part II of this Article briefly describes the law of removal and the two differing paths states and lower federal courts have taken in terms of rescue.⁹ Part III provides an historical account of rescue's evolution, from colonial times to the emergence of the modern welfare state.¹⁰ Part IV draws what I believe are natural comparisons to the laws of arrest and commitment.¹¹ Armed with these comparisons, histories, and policies, Part V then attempts to sort out a reasoned explanation for why prior judicial authorization ought to prove the norm in the context of child abuse.¹²

II. A BRIEF DESCRIPTION OF RESCUE AND REMOVAL

"Removal" is the formal process by which a child is physically and legally separated from his parents. Precise reasons for removal may differ from case to case, but generally tend to converge on a single principle: protecting children from physical and emotional harm. Children at risk, in turn, are commonly labeled "neglected" or "abused."

Removal includes not only an initial "rescue," whereby the child is tentatively—perhaps temporarily—taken from the home, but also a host of intermediary steps, like foster care, that are designed to ensure the child's safety. Ultimately, removal can lead to a complete termination of parental rights. For purposes of this Article, I use the term "rescue" to describe the initial, tentative seizure of the child. "Removal" is used generically to describe the full process that is aimed at protecting children from their parents.

Removal is largely regulated by the individual states. At least since 1974, however, when Congress enacted the Child Abuse Prevention and Treatment Act (CAPTA), the federal government has revealed a modicum of interest in the child

⁷ See *infra* notes 314–18 and accompanying text.

⁸ See *infra* notes 349–408 and accompanying text.

⁹ See *infra* notes 13–178 and accompanying text.

¹⁰ See *infra* notes 179–255 and accompanying text.

¹¹ See *infra* notes 256–415 and accompanying text.

¹² See *infra* notes 416–541 and accompanying text.

abuse phenomenon. CAPTA, which vaguely tied federal grants to states' child protection programs,¹³ was followed in 1980 and 1997 by two additional federal spending measures, the Adoption Assistance and Child Welfare Act¹⁴ (1980 Act) and the Adoption and Safe Families Act¹⁵ (1997 Act). The 1980 Act conditioned federal funding on states making "reasonable efforts" to correct familial problems before terminating parental rights.¹⁶ The 1997 Act, in turn, continued to require reasonable efforts to maintain and restore families, but also finessed the 1980 Act's language to facilitate and encourage adoption.¹⁷ While it is arguable that the federal "reasonable efforts" command includes encouraging pre-rescue judicial oversight when possible, no court to date has construed the 1980 and 1997 Acts in this fashion. The unwavering assumption has been that federal statutes and regulations do not limit when or how children can be rescued from their parents.

State rescue laws today, though differing in their specific language, tend to agree that "probable cause" offers the proper standard for temporarily rescuing children from their homes. As with criminal law, probable cause is not equated with certainty, or even likelihood, of abuse.¹⁸ Instead, the question is simply whether the facts and circumstances would lead a reasonable person to believe that a child has been, is being, or might be abused.¹⁹ If so, the child can be temporarily taken, pending a more thorough review when time permits. Only later

¹³ See Howard A. Davidson, *Child Protection Policy and Practice at Century's End*, 33 FAM. L.Q. 765, 767 (1999) (noting that CAPTA marked Congress's "first direct action to address child maltreatment within the home").

¹⁴ Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500.

¹⁵ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

¹⁶ See Michael T. Dolce, *A Better Day for Children: A Study of Florida's Dependency System with Legislative Recommendations*, 25 NOVA L. REV. 547, 556 (2001) (observing that the "Adoption Assistance and Child Welfare Act of 1980 ("AACWA")... sought to better ensure that children are only removed from their families of origin if 'reasonable efforts' are made to prevent the need for removal").

¹⁷ See U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON HUMAN RESOURCES, COMMITTEE ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES: FOSTER CARE—STATES' EARLY EXPERIENCES IMPLEMENTING THE ADOPTION AND SAFE FAMILIES ACT 1 (Dec. 1999), <http://www.gao.gov/archive/2000/he00001.pdf> (last visited Sept. 19, 2004) (explaining that the 1997 Act "clarif[ies] the circumstances under which states are not required to try to prevent a child's removal from home or to return a foster child home [and therefore] allows states to forgo services to preserve or reunite the biological family") (citations omitted).

¹⁸ See WAYNE R. LAFAVE, J. ISRAEL & N. KING, CRIMINAL PROCEDURE 146 (3d ed. 2000) (observing that probable cause in criminal cases speaks to "probabilities").

¹⁹ This is not to say that the probable cause standard for civil rescue and removal is the same as that for criminal search and seizure. It may be that the former is less demanding than the latter. See LAFAVE ET AL., *supra* note 18, at 148 (observing that in civil matters, the probable cause standard may be reduced). This matter, however, lies beyond the scope of this Article.

must the state prove (by clear and convincing evidence²⁰) that parents are “unfit”²¹ and that their rights should be terminated. Until this happens, probable cause provides sufficient reason to rescue and keep a child from his parents.

As might be expected, judicial oversight is built into all states’ removal systems. Like criminal cases, however, hearings and investigations can take weeks, months, and (sometimes) years. All states agree that parents are entitled to judicial review throughout this process. No one today would dare claim that parental rights can or should be terminated without some sort of judicially supervised, contested hearing. Parents must, at a minimum, be afforded an opportunity to challenge the termination of their rights in open court.

Timing is where states disagree. Must judicial oversight precede rescue? Or can it come after? Two distinct approaches have emerged. Several states have enacted measures generally demanding prior judicial authorization for rescues and removals.²² Judicial approval, under these schemes, is only excused by “exigent” or “necessary” circumstances. For example, New York law authorizes warrantless removals when there is “reasonable cause to believe that the child is in . . . imminent danger” and “there is not time enough to apply for an order”²³ Arkansas law states that warrantless removals are permissible only when the child is in “immediate danger,” “removal is necessary to prevent serious harm,” and “there is not time to petition for and to obtain an order of the court prior to taking the juvenile into custody.”²⁴ Similarly, Illinois law authorizes dispensing with prior judicial process when “there is not time to apply for a court

²⁰ See *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (holding that the State must prove that the parent is unfit by clear and convincing evidence).

²¹ See, e.g., *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (“[W]e have little doubt that the Due Process Clause would be offended ‘[i]f a [s]tate were to attempt to force the breakup of a natural family . . . without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.’”) (citations omitted).

²² See, e.g., ALA. CODE § 12-15-56 (1995) (requiring prior judicial authorization except when immediate removal is “necessary”); ARIZ. REV. STAT. ANN. §§ 8-303, 821 (West 1999 & Supp. 2003) (requiring same); GA. CODE ANN. § 15-11-45 (Lexis 2001) (requiring same); N.D. CENT. CODE § 27-20-13 (1991) (requiring same); 42 PA. CONS. STAT. ANN. § 6324 (2000 & Supp. 2004) (requiring same); WIS. STAT. ANN. § 48.19(d) (West 2003) (requiring same); see also ARIZ. REV. STAT. § 8-821 (1999 & Supp. 2003) (authorizing warrantless removal where “clearly necessary” to protect child from “imminent[] . . . abuse”); CONN. GEN. STAT. ANN. § 17-101g (West 1998 & Supp. 2004) (authorizing immediate removal where necessary to prevent imminent harm); D.C. CODE ANN. § 16-2310(b) (2001 & Supp. 2004) (requiring prior hearing unless warrantless removal “required” to protect child); IDAHO CODE § 16-1612 (Michie 2001 & Supp. 2003) (dispensing with warrant where “prompt removal is necessary”); NEV. REV. STAT. ANN. § 432B.390.1(a) (Michie 2002) (authorizing warrantless removal where “immediate action is necessary” to protect child).

²³ N.Y. COURT ACTS LAW § 1024(a) (McKinney 1999). See *Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999) (discussed *infra* notes 140–49 and accompanying text).

²⁴ See ARK. CODE ANN. § 9-27-313(a)(1)(c) (2002 & Supp. 2003).

order.”²⁵ Iowa’s,²⁶ Missouri’s,²⁷ Tennessee’s,²⁸ and Virginia’s statutes are all of similar ilk.²⁹

On the other side of this divide, a number of jurisdictions have dispensed with warrants (and other forms of ex ante court orders) altogether in the child abuse arena. Rather than condition initial removal on warrants or what commonly constitute “exigent circumstances,” only probable cause to believe the child has been, or is being, abused is needed. “[S]tandard office procedure” in New York City prior to 1999, for example, was to seek “removal of a child first and . . . a court order later”³⁰ Utah law authorizes warrantless removals based on only a “substantial risk . . . of . . . physical[] or sexual[] abuse[.]”³¹ Rhode Island allows removal by law enforcement officers [w]hen the child’s condition or surroundings reasonably appear to be such as to jeopardize the child’s welfare,³² and by social workers when there exists “reasonable cause to believe that the child or his or her sibling has been abused and/or neglected and that continued care of the child by his or her parent or other person responsible for the child’s welfare will result in imminent further harm to the child.”³³ In Kansas, children

²⁵ See ILL. COMP. STAT. ANN. § 5/5 (West 2001).

²⁶ See IOWA CODE ANN. § 232.79 (West 2000 & Supp. 2004) (allowing warrantless removal when “there is not enough time to apply for an order”).

²⁷ See MO. ANN. STAT. § 210.125.2 (West 2004) (warrantless removal authorized where “imminent danger” and “reasonable cause to believe the harm or threat to life may occur before a juvenile court could issue a temporary protective custody order or before a juvenile officer could take the child into protective custody”).

²⁸ See TENN. CODE ANN. § 37-1-114(a)(2) (2001) (authorizing warrantless removal “because the child is subject to an immediate threat to the child’s health or safety to the extent that delay for a hearing would be likely to result in severe or irreparable harm”).

²⁹ See *Jordan by Jordan v. Jackson*, 15 F.3d 333, 344 (4th Cir. 1994) (observing that emergency removals in Virginia are allowed only when “a court order is not immediately obtainable”). See also N.H. REV. STAT. ANN. § 169-C:3(XXIV) (2002). This statute defines protective custody to mean

the status of a child who has been taken into physical custody by a police officer or juvenile probation and parole officer because the child was in such circumstances or surroundings which presented an imminent danger to the child’s health or life and where there was not sufficient time to obtain a court order.

Id.; *Wallis v. Spencer*, 202 F.3d 1126, 1138, 1140 (9th Cir. 2000) (interpreting California law to not authorize warrantless removal in the absence of exigent circumstances).

³⁰ See *Tenenbaum v. Williams*, 193 F.3d 581, 591 (2d Cir. 1999).

³¹ UTAH CODE ANN. § 62A-4a-202.1(1)(b) (2004). The failure to provide pre-deprivation process in Utah was successfully challenged in *Roska v. Peterson*, 328 F.3d 1230 (10th Cir. 2003). For a discussion of *Roska*, see *infra* notes 171–78 and accompanying text.

³² R.I. GEN. LAWS § 40-11-5(b) (2004).

³³ *Id.* § 40-11-5(d). This same statute then provides that “the child shall not be detained in protective custody longer than forty-eight (48) hours without the expressed approval of a justice of the family court.” *Id.*

can be removed when officials have reasonable grounds to believe that circumstances are "harmful to the child,"³⁴ even when there is time to seek a warrant.³⁵ Oklahoma law authorizes removal "[b]y a peace officer or employee of the court, without a court order if . . . continuation of the child in the child's home is contrary to the health, safety or welfare of the child"³⁶ Oregon allows warrantless removals "[w]hen the child's condition or surroundings reasonably appear to be such as to jeopardize the child's welfare"³⁷ Similarly, Montana authorizes social workers and police officers who have "reason to believe any youth is in immediate or apparent danger of harm" to "immediately remove the youth and place the youth in a protective facility."³⁸

Two distinct approaches have thus emerged in the United States. The former favors warrants, court orders, and judicial assistance. Only true, factually specific emergencies justify unilateral executive action. The latter approach trusts police officers and social workers to make proper rescue decisions, at least in the first instance and for a limited amount of time. One might say that potential child abuse constitutes a categorical emergency, and immediate rescue is always justified by probable cause. Time and ability to seek warrants or court orders are irrelevant under this regime. Exigent circumstances are not needed.³⁹

³⁴ See KAN. STAT. ANN. § 38-1527(b) (2000).

³⁵ See *Stremski v. Owens*, 734 P.2d 1152, 1155 (Kan. 1987) (interpreting Kansas law to authorize removal based solely on probable cause to believe child was abused).

³⁶ OKLA. STAT ANN. tit.10, § 7003-2.1.A.1 (West Supp. 2004).

³⁷ OR. REV. STAT. ANN. § 419B.150(1)(a) (Michie 2003).

³⁸ MONT. CODE ANN. §41-3-301(1) (2003). See also KY. REV. STAT. ANN. § 620.040(5)(c) (Michie Supp. 2003) (authorizing warrantless removal when police have probable cause to believe a child "is being sexually abused"); MICH. COMP. LAWS ANN. § 712A.14 (West 2002) (authorizing police to take custody of a child "whose surroundings are such as to endanger his or her health, morals, or welfare" without a warrant). Laws in several other states are ambiguous about when immediate, warrantless removal is proper. In Hawaii, for example, police may remove children if they feel the parents have harmed the children and are "likely to flee." HAW. REV. STAT. § 587-22 (Supp. 2003). Children can then be retained in governmental custody, without a hearing, so long as they are threatened with "imminent harm." *Id.* § 524 (1993). Some states, like Maryland and Mississippi, condition warrantless removals on "immediate danger," without defining that term. See MD. CODE ANN., FAM. LAW § 5-709(d) (1999) (allowing forcible entry and removal based on "belie[f] that a child is in serious, immediate danger"); MISS. CODE ANN. § 43-21-303 (1999) (child may be summarily removed if there is probable cause to believe the "child is in immediate danger"); *In re Guardianship of L.S. & H.S.*, 87 P.3d 521, 526 n.22 (Nev. 2004) (Nevada law "does not provide judicial review prior to the state initiating an investigation or taking the child into protective custody. A hearing is provided only afterward.").

³⁹ It is impossible to say which approach predominates in the United States. One commentator has offered that "[m]ost warrantless entries and searches in the context of child abuse investigations are conducted in accordance with the emergency doctrine [established in *Mincey v. Arizona*, 437 U.S. 385, 392 (1978)]." See Jillian Grossman, Note, *The Fourth Amendment: Relaxing the Rule in Child Abuse Investigations*, 27 FORDHAM URB. L.J. 1303,

Each of these approaches has pluses and minuses on a normative scale. Prior judicial review, for example, checks executive license and eliminates errors.⁴⁰ This enhanced accuracy, however, is not cost-free. Judicial time is expensive.⁴¹ The demands of the warrant process might dissuade government officials from pursuing abuse complaints in close cases,⁴² allowing abuse to continue. Dispensing with the need for prior judicial review, meanwhile, saves time (and money) and may facilitate detection, but risks unnecessary invasions of privacy and familial harmony.⁴³ Further, invasive governmental practices risk alienating parents who need help and who would otherwise cooperate with social workers. Putting money aside, the question comes down to this: what is the optimal way to uncover child abuse while respecting familial privacy?

Two constitutional doctrines prove relevant to whether judicial participation must precede, or may follow, a state's rescue of an allegedly abused child. First, the Fourth Amendment bans unreasonable searches and seizures. The Supreme Court has concluded—at least as a starting point—that the Fourth Amendment's

1332 (2002). In populous jurisdictions, like New York City and Florida, however, the opposite appears true. Even in those states that require exigent circumstances, social workers tend to err on the side of child safety, which often undermines any statutory warrant requirement that is in place. This is what happened in Florida prior to the 1998–1999 statutory changes (which are discussed *infra* notes 56–64 and accompanying text); social workers simply ignored the state's statutory warrant requirement and claimed that every case involved an emergency. It is plausible today that most rescues in the United States take place without either warrants or exigent circumstances. See Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protection Proceedings*, 42 FAM. CT. REV. 540, 540–41 (2004) (observing that “more than 700 children” are removed each day in the United States and that they “are seldom removed on anything but an emergency basis—either unilaterally, without a court order, or on the basis of some form of ex parte judicial authorization. The number of emergency removals, moreover, . . . now occur at nearly double the rate of 20 years ago.”) (citation omitted).

⁴⁰ See William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 891, 893 (1991) (observing that warrants are “likely to help, at least marginally, prevent bad police searches” and do “reduce the odds of police mistake in applying the relevant legal standards”).

⁴¹ *Id.* at 888 (“Warrants are, in short, costly.”).

⁴² *Id.* at 891 (“[T]he police are surely less likely to search my house if they must wait around a courthouse to get permission than if they may simply drive to my door and walk in.”).

⁴³ *Id.* at 893 (concluding that “pre-screening devices[] . . . can virtually eliminate the risk of mistake . . . [a]nd surely it is better to prevent harm from happening than to clean up the milk after it's been spilled”). Professor Stuntz ultimately concludes that the benefits supporting the warrant requirement may be overstated. Post-search review, he concludes, provides a realistic deterrent, and thus helps limit license and mistakes. *Id.* at 891 (“[I]t seems likely that warrants do no more than catch the occasional case where a police officer wants to behave with clear illegality but does not fear any after-the-fact sanction.”).

reasonableness requirement demands prior judicial approval.⁴⁴ Because the rescue of a child is generally understood to qualify as a seizure,⁴⁵ the Fourth Amendment offers an obvious constitutional stumbling block. Second, the Fourteenth Amendment's Due Process Clause ordinarily requires process—sometimes judicial in nature—before deprivations of life, liberty and property.⁴⁶ Parents' interests in caring for and controlling their children have long been recognized as "liberty" within the Fourteenth Amendment's terms. Due process, at first blush, would thus appear to require some sort of process before children can be taken from their homes.

Unfortunately, it is not that easy. Students of Criminal Procedure and Constitutional Law have long been tortured by exceptions to constitutional rules. The Fourth Amendment, in particular, is so peppered with exceptions that many think it folly to speak about a "general" warrant requirement.⁴⁷ The same goes for procedural due process, which quite often allows post-deprivation process and only occasionally demands that prior process be cloaked in judicial garb.⁴⁸ Foregoing *ex parte* pre-rescue judicial authorization in favor of contested post-rescue process in child abuse cases certainly has constitutional support. Indeed, as the circuit split described below demonstrates, Fourth and Fourteenth Amendment precedents point in both directions.

A. Florida's Experience

Florida's child welfare system has been under fire for almost twenty years. One commentator has observed that it is "seemingly out-of-control, inflexible, and unfixable."⁴⁹ Another has concluded that Florida has "a remarkable history of failure."⁵⁰ Since 1985, Florida's child welfare system has been studied by twelve

⁴⁴ See generally LAFAVE ET AL., *supra* note 18, at 157–60 (observing that the general preference for search warrant is defined by its numerous exceptions).

⁴⁵ See *infra* notes 286–92 and accompanying text.

⁴⁶ See generally Mark R. Brown, *De-Federalizing Common Law Torts: Empathy for Parratt, Hudson and Daniels*, 28 B.C. L. REV. 813, 817–18 (1987) (describing Supreme Court cases generating this proposition).

⁴⁷ See Stuntz, *supra* note 40, at 882 (noting that "in practice warrants are the exception rather than the rule").

⁴⁸ See Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1277 (1975) (discussing the "flexible" nature of procedural due process and how it sometimes allows non-judicial process before deprivations).

⁴⁹ Marsha B. Freeman, *Privatization of Child Protective Services: Getting the Lion Back in the Cage?*, 41 FAM. CT. REV. 449, 449 (2003).

⁵⁰ Tony Bridges, *Lost in Plain Sight: The Legacy of Foster Care—Kids Find the State Fails Them*, TALLAHASSEE DEMOCRAT, Feb. 9, 2003, at A1.

special committees and at least five grand juries.⁵¹ It is no exaggeration to say that Florida's model is a constant work in progress.

Given its faults and shortcomings, Florida officials have regularly tinkered with the system. Like most states,⁵² Florida initially offered few procedural protections to parents suspected of child abuse. Parcel to the procedural revolutions of the 1960s⁵³ and 1970s,⁵⁴ however, Florida (like many states) reformed its child welfare system in 1978 to require pre-rescue judicial authorization. Judicial participation was only excused by "immediate danger," a close cousin of "exigent circumstances."⁵⁵

Florida followed this model for twenty turbulent years. By 1998, however, it became clear that changes were needed. Florida's system too often failed to protect abused children. One case, in particular, grabbed the public's attention. Kayla McKean, a six-year-old girl, was beaten to death by her abusive father.⁵⁶ Critics blamed Florida's Department of Health and Rehabilitative Services (HRS) for her death. HRS, after all, had received several abuse reports, but did not act quickly enough to save her.⁵⁷ In order to fulfill a campaign pledge to "fix the system," newly-elected Governor Jeb Bush orchestrated a massive overhaul of Florida's protective services system.⁵⁸

⁵¹ *Id.*

⁵² See *infra* notes 179–243 and accompanying text.

⁵³ See, e.g., *In re Gault*, 387 U.S. 1, 41 (1967) (holding that juvenile delinquents are entitled to many of the procedural protections due adults). See *infra* notes 244–48 and accompanying text.

⁵⁴ See, e.g., Brown, *supra* note 46, at 822–23 (describing procedural revolution of 1970s in context of Due Process).

⁵⁵ Florida enacted a version of the UNIFORM JUVENILE COURT ACT (1968) [hereinafter MODEL ACT], which is discussed *infra* notes 249–55 and accompanying text. See 1978 Fla. Laws ch. 78–414, § 20. As enacted in 1978, FLA. STAT. ANN. § 39.401(1) (West 1978) required either a court order, *id.* § (a), or "reasonable grounds to believe that the child has been abandoned, abused, or neglected, is suffering from illness or injury, or is in immediate danger from his surroundings and that his removal is necessary to protect the child." *Id.* § (b). See FLA. STAT. ANN. § 39.401 (West 1987) (quoting 1978 version of statute). Florida's Rules of Juvenile Procedure at this time reflected § 39.401(1)'s preference for court orders. Rule 8.030 authorized courts to issue detention orders "directing that [children] be taken into custody" based on verified petitions, affidavits or sworn testimony. See Petition of the Florida Bar to Amend the Florida Rules of Juvenile Procedure, 462 So. 2d 399 (Fla. 1984) (reporting amended Florida Rules of Juvenile Procedure); see also *In re* Petition of the Florida Bar to Amend the Florida Rules of Juvenile Procedure, 589 So. 2d 818 (Fla. 1991) (reporting the same rule renumbered as 8.005 in 1991).

⁵⁶ See Michael Fechter, *Helping Till it Hurts? DCF Errs By Taking Children in Marginal Cases*, *Lawyers Say*, TAMPA TRIB., May 29, 2002, at 1 (describing Kayla McKean's murder).

⁵⁷ *Id.* ("State officials were blamed for failing to act on numerous complaints and suspicions that the child was being abused.").

⁵⁸ See RUTH STONE EZELL, FLORIDA JUVENILE LAW AND PRACTICE § 1.18 (1999). The author makes the following observations regarding Florida's system in 1998:

Florida's changes included more expansive reporting requirements,⁵⁹ greater penalties for those who did not report child abuse,⁶⁰ and increased investigatory requirements.⁶¹ Because of the publicity generated by cases like Kayla McKean's, HRS's name was even changed to "Department of Children and Families" (DCF). Last but not least, Florida abandoned its pre-deprivation process model. Florida's alternative requirements of prior judicial authorization⁶² or exigent circumstances⁶³ were deleted in favor of a simple probable cause standard. Judicial oversight under Florida's revamped approach would come only after rescue.⁶⁴

The year 1998 was also a year of child deaths and disappearances. Some of these children previously had been reported as victims of abuse or neglect to the Department In response, changes were enacted to dependency statutes to impose mandatory obligations on the department when there are previous reports of abuse and neglect.

Id.

⁵⁹ See FLA. STAT. ANN., § 39.201(1)(g) (West 2002).

⁶⁰ *Id.* § 39.205.

⁶¹ *Id.* § 39.301.

⁶² See 1998 Fla. Laws ch. 98-403, § 57.

⁶³ See 1999 Fla. Laws ch. 99-193, § 22. Florida law was thus changed from alternatively requiring court orders or emergency circumstances to demanding only probable cause:

(1) A child may only be taken into custody:

(a) Pursuant to the provisions of this part, based upon sworn testimony, either before or after a petition is filed; or

(b) By a law enforcement officer, or an authorized agent of the department, if the officer or authorized agent has probable cause to support a finding:

1. That the child has been abused, neglected, or abandoned, or is suffering from or is in imminent danger of illness or injury as a result of abuse, neglect, or abandonment;

2. That the parent or legal custodian of the child has materially violated a condition of placement imposed by the court; or

3. That the child has no parent, legal custodian, or responsible adult relative immediately known and available to provide supervision and care.

FLA. STAT. ANN. §39.401 (West 2003).

⁶⁴ See FLA. STAT. ANN. § 39.402(8)(a) (West 2003) ("A child may not be held in a shelter longer than 24 hours unless an order so directing is entered by the court after a shelter hearing.").

Florida's statutory changes brought immediate results. DCF offices were inundated with child abuse reports. Calls to Florida's toll-free child abuse hotline,⁶⁵ and the investigations that followed,⁶⁶ rose by almost half. The number of rescues, dependency petitions,⁶⁷ and shelters,⁶⁸ meanwhile, almost doubled. Notwithstanding significant budget increases,⁶⁹ even larger caseworker turnover rates⁷⁰ prevented Florida's investigative system from keeping up.⁷¹ Caseworkers' average loads, which tripled, greatly exceeded DCF's expected levels.⁷²

As caseworker loads increased, newspapers in Florida reported more and more lapses by DCF.⁷³ Not only was parental abuse often overlooked,⁷⁴ but

⁶⁵ See Karla Jackson, *Abuse Reports Rise, Strains Frantic DCF*, TAMPA TRIB., June 15, 2002, at 1 ("Calls to the hot line shot up 43 percent after the 1998 death of Kayla McKean . . ."). This phenomenon does not appear to be confined to Florida. Rather, it appears to be national in scope. See Harold A. Richman, *From a Radiologist's Judgment to Public Policy on Child Abuse and Neglect: What Have We Wrought?*, 30 PEDIATRIC RADIOLOGY, 219, 223 (2000).

⁶⁶ See Fechter, *supra* note 56 (reporting that "[i]nvestigations have jumped 45 percent since a change in state law made it a crime not to report suspected child abuse").

⁶⁷ See *In re Certification of Need for Additional Judges*, 780 So. 2d 906, 909 (Fla. 2001) (observing that statutory revisions increased dependency filings by eighty-four percent between July 1997 and December 1999).

⁶⁸ See David Cox, *Florida Has Plenty of Similar Laws: From Child-Protection to Growth-Management: Unintended Consequences Mar Many of the Sunshine State's Policies*, ORLANDO SENTINEL, July 2, 2000, at G1 (observing that the number of children "placed into protective homes shot up 74 percent, placing bigger burdens in an already overburdened foster-care system").

⁶⁹ See Karla Jackson, *Down But Not Out: Neglect Allegations Arise Because of a Family's Poverty*, TAMPA TRIB., July 7, 2002, at 1 (observing that "[l]awmakers have poured money into the DCF since the 1998 death of Kayla McKean" and that "[f]unding for the department has more than doubled since then, from \$167 million in 1998-99 to \$339 million for 2002-03").

⁷⁰ See Fechter, *supra* note 56 (quoting Jack Levine, president of Center for Florida's Children, as stating Florida has a "42 percent turnover rate each year"); *More Funding for Neglected Children*, TAMPA TRIB., Jan. 29, 2003, at 10 (observing that Governor Bush sought to hire 400 new caseworkers and increase their salaries "in an effort to keep them on board").

⁷¹ See Kathleen Chapman, *Thousands Could Lose DCF Jobs in Revamp*, PALM BEACH POST, Feb. 7, 2003, at 10A (quoting DCF head, Jerry Regier, as stating that his "overburdened agency . . . has too few workers trying to care for too many children"). In an effort to cure its personnel problem, DCF in 2003 began attempting to transfer its investigative duties to local sheriffs' offices. *Id.*

⁷² See Jackson, *supra* note 65 (reporting that Mike Watkins, family safety director for DCF, stated that investigators were handling forty-four cases at a time, when the "ideal" load ought to be twelve).

⁷³ See Bridges, *supra* note 50 ("Newspaper headlines read like a litany of disasters: missing kids, drunken caseworkers, lost records and a \$230 million computer system that didn't work correctly.").

⁷⁴ See Carol Marbin Miller, *Regier: DCF Needs to Shrink*, MIAMI HERALD, Feb. 5, 2003, at 1B (noting that "more children who were already the subject of at least one abuse or neglect report died in 2001 than ever before"); *Keeping Families Intact*, ST. PETERSBURG TIMES, Feb.

foster care abuse emerged as a notorious problem.⁷⁵ Further, newspapers began reporting innocent parents who had become mired in Florida's welfare system.⁷⁶ Not only were children being needlessly rescued from their homes,⁷⁷ but parents were finding it extremely difficult to prove their innocence and retrieve their children. Children in Florida were thus spending more time than ever in foster care.⁷⁸

It is impossible to identify a single cause of Florida's foster care phenomenon. It may be that more children in Florida truly needed protection. Florida's enhanced reporting and investigating requirements resulted in more frequent discoveries of abused children, and consequently the placement of more children in foster homes. Another factor that should be considered is whether Florida's "rescue first" policy has helped inflate Florida's foster care population. Are judges less willing to return rescued children to their parents than they are to deny rescue warrants beforehand? If so, it may be that the shift from pre- to post-deprivation process has fueled foster care's inflation.

Florida's experience with post-deprivation process suggests that this may in fact be the case. During one fifteen-month period in 1999–2000, for example, 2857 children were summarily rescued by Florida officials.⁷⁹ Only eighty-six of these children, approximately three percent, were returned to their parents within twenty-four hours.⁸⁰ Because some of these returns resulted from unilateral agency decisions,⁸¹ DCF's success rate under Florida's post-deprivation review

15, 2003, at 14A ("In some districts, headlines suggest . . . [m]any kids have been left in unsafe situations because department caseworkers have lacked the time, training or shelter beds to place them elsewhere.").

⁷⁵ See, e.g., Susan Jacobson, *Sex Abuse Suspect Walks into a Trap*, ORLANDO SENTINEL, July 17, 2003, at B1 (describing allegations of sex abuse in foster care); Tonyaa Weathersbee, *No Easy Answers in Sight for State Children's Agency*, FL. TIMES-UNION, June 2, 2003, at B7 (describing children's deaths at hands of foster parents).

⁷⁶ See Miller, *supra* note 74 (observing that "an unprecedented number of children were taken from their parents"); *Keeping Families Intact*, *supra* note 74 ("Critics often accused [DCF] . . . of removing too many children from their homes.").

⁷⁷ See, e.g., Fechter, *supra* note 56 (describing story of mother whose two children were removed because one accidentally suffered a broken arm). One Florida lawyer commented, "If there is any inkling of any kind of problem in the home, they yank the kid out." *Id.* (quoting lawyer Norman Palumbo).

⁷⁸ See Dolce, *supra* note 16, at 551–52 (observing that Florida's average stay in foster care is almost three years). See also Chill, *supra* note 39, at 541 (observing that the foster care population in America suffered "inexorable growth . . . fueled by emergency removals, [and] has led to a consensus that the child welfare system is in crisis.").

⁷⁹ This period began on July 1, 1999 and ended on September 30, 2000. See *Doe v. Kearney*, No. 8:00-cv-184-T-26B (M.D. Fla. 2000) (deposition of Beth Pasek at 12–13) (on file with author).

⁸⁰ *Id.* at 13.

⁸¹ *Id.*

model thus closely approached ninety-eight percent.⁸² Remarkable as it may sound, Florida's judges found that DCF correctly estimated probable cause in ninety-eight out of every one hundred cases.

Of course, these figures admit several possible explanations. It may be that Florida's caseworkers are remarkably good at what they do. Alternatively, Florida's population of abused children might be so large that even shoddy investigations uncover real problems. More likely, Florida's judges simply proved unwilling to return rescued children to their parents. DCF was uniformly given every benefit of the doubt, even when probable cause was plainly lacking. Rather than prove that DCF is quite prescient, Florida's ninety-eight percent success rate is more plausibly explained by its judges simply acting as "rubber stamps."

Proving that Florida's judges are unduly deferential or that DCF is uncannily good is impossible. However, Florida's anecdotal evidence of disarray⁸³ and commonly accepted success rates for warrantless and warrant-based searches impeach any inference that DCF is practically perfect. Conventional wisdom recognizes that warrantless searches are more error-prone than those supported by warrants. Professor Stuntz explains this phenomenon as a function of the time and effort needed to obtain warrants:

Warrants raise the costs of searching. To get them, police must draft affidavits and wait around courthouses. Partly for this reason, warrants also raise the substantive standard applied to the search. If an officer knows he must spend

⁸² "Shelter" hearings must be held in Florida within twenty-four hours of rescue. See FLA. STAT. ANN. § 39.402(8)(a) (West 2003).

A child may not be held in a shelter longer than 24 hours unless an order so directing is entered by the court after a shelter hearing. In the interval until the shelter hearing is held, the decision to place the child in a shelter or release the child from a shelter lies with the protective investigator.

Id.

These hearings are designed to assess the factual basis supporting the rescue—that is, whether probable cause exists. Should a judge conclude that probable cause does not exist, the child is not sheltered and is returned to his parents. Even in the few cases where this occurred, Florida officials adamantly denied making mistakes. When asked whether mistakes had been made in the small number of cases that resulted in findings of no probable cause, Beth Pasek, a Family Services Specialist, stated: "I don't think they're errors when it's—when you're looking at probable cause and you're following the procedures that are set for you when you're making the decision is this child at risk. So you're not making any error when you choose to protect a child." Deposition of Beth Pasek, *supra* note 79, at 13.

⁸³ See *supra* notes 49–51 and accompanying text. See also Chill, *supra* note 39, at 543–44 (concluding that judges are unwilling to overturn rescues because of an unwillingness to place children in a potentially abusive environment).

several hours on the warrant, he is likely not to ask for it unless he is pretty sure he will find the evidence.⁸⁴

The best estimates for warrant-based searches peg success rates—defined as locating at least part of the evidence being sought—somewhere between seventy and ninety percent.⁸⁵ Given the “strikingly impressive”⁸⁶ nature of these success rates, I suspect that serious students of police practices would be surprised to find a police department with a *warrantless* success rate exceeding eighty percent. This would be particularly true of a police department whose officers were grossly overworked, woefully undertrained, and constantly looking for other employment. Arguing that caseworkers in Florida, under these very same conditions, are correct about probable cause ninety-eight percent of the time defies logic. Indeed, the local judge in Florida who ordered the return of the Does’ children (discussed below) complained that she was supplied “incorrect information all the time” by DCF agents.⁸⁷

DCF, moreover, has all but admitted that the Kayla McKean tragedy caused it to rescue more children than necessary. In early 2003, DCF’s new leadership pledged additional reforms designed to reduce caseworkers’ workloads and increase their salaries.⁸⁸ DCF also promised a greater emphasis on preserving

⁸⁴ William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 848 (2001).

⁸⁵ *Id.* (“[P]olice find at least some of what they’re looking for in more than eighty percent of warrant-based searches, and find most of what they’re looking for in . . . over seventy percent of such searches.”). See also Donald Dripps, *Living With Leon*, 95 YALE L.J. 906, 925 (1986) (observing that for warrant searches, “the proportion of searches that discovered at least some of the evidence named in the warrant ranged from 74 to 89%”).

⁸⁶ Dripps, *supra* note 85, at 925.

⁸⁷ See *infra* notes 111–12 and accompanying text. I recognize that my comparison—between social workers believing they have probable cause and police uncovering evidence—is not perfect. In particular, there need be no direct correlation between “success” and “probable cause.” A police officer may be correct about the existence of probable cause, for example, and yet less-than-successful at uncovering evidence. A success rate of eighty percent, thus, does not necessarily imply that police officers’ estimations of probable cause are correct only eighty percent of the time. While I am aware of no data establishing how often police properly estimate probable cause, I seriously doubt that police officers are correct ninety-eight percent of the time. Their success rates, while impressive, prove they make mistakes. And these mistakes likely infect estimations of probable cause, too. Similarly, given national studies suggesting that one-third of all rescued children have suffered no abuse, see Chill, *supra* note 39, at 541, it seems reasonably clear that social workers make mistakes. I thus cannot believe they correctly estimate probable cause ninety-eight percent—or even ninety percent—of the time.

⁸⁸ See Miller, *supra* note 74 (observing that DCF planned on hiring 1000 new employees, increasing salaries, and reducing workloads to the national average).

families,⁸⁹ which translates into fewer rescues.⁹⁰ In fact, DCF has now pledged to reduce the number of children placed in the state's care by twenty-five percent.⁹¹

This does not mean that pre-rescue review would necessarily prove less deferential to DCF. Like it or not, judges may simply err on the side of rescue, whether consulted before or after the fact. Still, having taught Criminal Procedure for a number of years, I (like others in the field) continue to believe that judges "apply a higher standard when judging warrant applications before the search than when deciding suppression motions after the incriminating evidence has been found."⁹² Experience teaches that judges are less deferential toward executive officers when asked to authorize their conduct beforehand.

B. Doe v. Kearney

*Doe v. Kearney*⁹³ arose during the heyday of Florida's "rescue first" policy. On January 18, 2000, John Doe's nine-year-old niece (T.O.) stated to some unknown person that her uncle (John Doe) had molested her four years earlier.⁹⁴

⁸⁹ Miller, *supra* note 74.

⁹⁰ See Chapman, *supra* note 71, at 10A (quoting Jerry Regier as stating that "I think clearly what we saw in the previous administration was more of the emphasis on removal, and we believe, without lowering any standards of safety, that we can certainly serve some children in their homes").

⁹¹ See Miller, *supra* note 74 (observing that DCF "will seek to reduce the number of children in state care by 25 percent before the summer of 2004").

⁹² Stuntz, *supra* note 84, at 848. See also Chill, *supra* note 39, at 547 (arguing that the pressures on judges to approve rescues "increase dramatically once the child is already in placement" and "[r]equiring judicial preauthorization of emergency removals whenever possible . . . may prevent at least some unnecessary removals").

⁹³ Doe v. Kearney, 329 F.3d 1286 (11th Cir. 2003), *cert. denied sub nom. Doe v. Regier*, 124 S. Ct. 389 (2003).

⁹⁴ Unless otherwise indicated, these facts are drawn from pleadings and reasonable inferences contained in the Does' Complaint (on file with author) and Defendants' Answer (on file with author). See Does' "Memorandum Supporting Motion for Partial Summary Judgment" (hereinafter "Does' Motion for Summary Judgment") (on file with author). Because the District Court granted judgment as a matter of law for the defendants, the factual recitation in this Article draws all reasonable inferences in favor of the Does. See *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000). Unfortunately, the Court of Appeals in *Doe* did not abide by this standard in reciting facts and drawing conclusions. For instance, its opinion suggests that O'Brien did not decide to remove N.O. and B.O. until *after* interviewing them on Friday evening. *Doe*, 329 F.3d at 1290-91. It also concluded that "the record demonstrates that [the Does] gave [O'Brien] consent to enter," *id.* at 1299 n.15, and that O'Brien had probable cause to remove the Does' children. Reasonable factfinders, like the state court that returned the Does' children, could just as easily have concluded that O'Brien lacked probable cause, decided to remove the children earlier in the day, and was not given legal permission to enter the Does' home. The Eleventh Circuit's conclusion that O'Brien's conduct was "nearly unassailable," *id.* at 1299, is thus factually questionable under any constitutional standard.

This charge was relayed to Florida's DCF⁹⁵ that same day.⁹⁶ Three days later, on January 21, 2000, at approximately 12:30 PM, the charge and accompanying intake report were forwarded to Deborah O'Brien, a social worker in DCF's Hillsborough County Office.⁹⁷ The report delivered to O'Brien was marked, "Response Priority: 24 hours," meaning that the risk of harm to the Does' children was "low to intermediate."⁹⁸ The report was not marked "Immediate Response" or "Response Priority: 3 hours," DCF's two higher priority levels, which would have indicated a need for immediate action.⁹⁹

Based on T.O.'s allegation and John Doe's criminal record—which O'Brien mistakenly interpreted to include prior child abuse charges—O'Brien decided that the Does' three minor children, D.M. (age 13), B.O. (age 6), and N.O. (age 9), needed to be immediately rescued from their parents. O'Brien reached this conclusion at approximately 2:10 PM on January 21, 2000. Pursuant to Florida law, O'Brien contacted supervisors in her office for approval.¹⁰⁰

Upon receiving approval, O'Brien at approximately 2:45 PM drove to D.M.'s school and had school officials remove her from class.¹⁰¹ D.M. was questioned about her parents and then formally taken into custody at about 4:10 PM.¹⁰² In an effort to coordinate the rescue of the remaining Doe children with local deputies, O'Brien waited for approximately two hours before driving to the Does' home, a short distance away.¹⁰³ Because D.M. did not arrive home from school on time, the unsuspecting Does immediately began searching for her. John Doe drove to her school while Jane Doe canvassed the neighborhood.¹⁰⁴ Between 5:20 PM and 6:00 PM, after unsuccessfully waiting for a deputy sheriff, O'Brien arrived at the Does' home¹⁰⁵ and announced to Jane Doe that "she had to allow me access to the children."¹⁰⁶ Jane Doe opened the door to her home and allowed O'Brien to

⁹⁵ Petitioners sued the DCF Secretary, Kathleen Kearney, and Don Dixon, head of the Hillsborough County office of DCF, in their official capacities under *Ex parte Young*, 209 U.S. 123 (1908), seeking declaratory and injunctive relief. The Does prospective claims against Kearney (who was later replaced by Regier) and Dixon were thus claims against DCF. See *Hafer v. Melo*, 502 U.S. 21, 26 (1991) (observing that claims against officials for prospective relief are in reality claims against their institutional employer).

⁹⁶ Does' Motion for Summary Judgment, *supra* note 94, at 4.

⁹⁷ Does' Motion for Summary Judgment, *supra* note 94, at 4.

⁹⁸ Does' Motion for Summary Judgment, *supra* note 94, at 4.

⁹⁹ Does' Motion for Summary Judgment, *supra* note 94, at 4.

¹⁰⁰ Does' Motion for Summary Judgment, *supra* note 94, at 4.

¹⁰¹ Does' Motion for Summary Judgment, *supra* note 94, at 5.

¹⁰² Does' Motion for Summary Judgment, *supra* note 94, at 4.

¹⁰³ Does' Motion for Summary Judgment, *supra* note 94, at 5.

¹⁰⁴ See *Doe v. Kearney*, No. 8:00-cv-184-T-26B (transcript of hearing, held on June 18, 2001, at 197–201) (on file with author).

¹⁰⁵ Does' Motion for Summary Judgment, *supra* note 94, at 5.

¹⁰⁶ Does' Motion for Summary Judgment, *supra* note 94, at 5.

question the Does' two younger children, B.O. and N.O.¹⁰⁷ O'Brien then seized the two children.

Pursuant to Florida law, a contested "shelter" hearing was held the following morning in Florida's Hillsborough County Circuit Court, a court of general jurisdiction.¹⁰⁸ The Does were present with their attorney. Based on T.O.'s allegation (which was described in O'Brien's affidavit), John Doe's "extensive arrest record,"¹⁰⁹ and his "history of molesting children,"¹¹⁰ DCF argued that probable cause existed to remove the Does' three children. When pressed by the court—which complained, "that's what people tell me for the past two years, extensive arrest record, and then when I see the arrest record, I see a DUI from 1978 or something like that,"¹¹¹ and "I get incorrect information all the time"¹¹²—DCF's counsel admitted that there was no evidence that John Doe had any prior child-abuse conviction.¹¹³ The court thus concluded that DCF lacked "probable cause to shelter these children at this time"¹¹⁴ and ordered their immediate return.

The Does sued DCF and O'Brien under the Fourth and Fourteenth Amendments. In addition to money damages from O'Brien, they sought prospective relief declaring Florida's rescue law unconstitutional and enjoining its enforcement.¹¹⁵ In a pretrial order,¹¹⁶ the district court upheld Florida's summary removal procedure as "satisf[ying] the emergency circumstances exception to pre-deprivation process"¹¹⁷ Although the "mere possibility of danger is not

¹⁰⁷ Does' Motion for Summary Judgment, *supra* note 94, at 5–6.

¹⁰⁸ Florida law requires that shelter hearings be had within twenty-four hours of rescue. See FLA. STAT. ch. 39.402(8)(a).

¹⁰⁹ See *In the Interest of B.O., N.O., D.O.* [sic], No. 501797 A, B, C (Jan. 22, 2000), at 4. A copy of the transcript of this hearing is attached as an Appendix to the Does' Petition for Writ of Certiorari filed with the Supreme Court of the United States. See *Doe v. Regier*, No. 03–174 (petition filed Aug. 1, 2003) (App. at 43).

¹¹⁰ *Doe v. Regier*, No. 03–174 (petition filed Aug. 1, 2003) (App. at 40).

¹¹¹ *Id.* at 43.

¹¹² *Id.* at 44.

¹¹³ *Id.*

¹¹⁴ *Id.* at 43.

¹¹⁵ Both the district court and court of appeals concluded that the Does had Article III standing to pursue their claims for prospective relief. See *Doe v. Kearney*, 329 F.3d at 1292–93. Because the Does' claim against O'Brien for damages raised the identical constitutional issues raised in their claim for prospective relief, the standing doctrine was no real impediment to the courts reaching the constitutional issues raised in the case. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 n.1 (1989) (noting that claim for money damages establishes standing).

¹¹⁶ See *Doe v. Kearney*, No. 8:00-cv-184-T-26B (M.D. Fla. Apr. 9, 2001). A copy of the district court's order is attached to the Does' Petition for Writ of Certiorari filed with the Supreme Court of the United States. See *Doe v. Regier*, No. 03–174 (petition filed Aug. 1, 2003) (App. at 25).

¹¹⁷ *Id.* at 32.

enough,”¹¹⁸ the court stated, “evidence of serious ongoing abuse” is.¹¹⁹ “Furthermore, [Florida law] provides that a hearing must occur within 24 hours after removal of a child, thereby affording parents post deprivation process. [The Does] failed to provide the Court with any binding cases where similar statutory provisions were deemed constitutionally insufficient.”¹²⁰ The only genuine issue, it concluded, was whether O’Brien had probable cause—which constitutes an automatic emergency under Florida law—to remove the Does’ children.¹²¹ If she did, rescue was proper under the Fourth and Fourteenth Amendments.

Trial commenced on June 18, 2001. Following the Does’ case-in-chief, the district court awarded O’Brien judgment as a matter of law based on qualified immunity.¹²² Notwithstanding the state court’s finding that O’Brien lacked probable cause,¹²³ the district court concluded as a matter of law that O’Brien had “arguable probable cause” to seize the Doe children.¹²⁴ In its final order, the district court stated that “O’Brien . . . was justified in believing that probable cause and emergency circumstances existed to justify removal of the Doe children from their parents without prior judicial approval as authorized by [Florida law].”¹²⁵

The Eleventh Circuit affirmed.¹²⁶ The Does’ argument, the Eleventh Circuit complained, would require:

that a state official obtain a court order prior to removing a suspected victim of child abuse from parental custody, unless: (1) the official has probable cause to believe the child is in imminent danger of abuse; and (2) the official reasonably

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 32–33.

¹²¹ *Id.* at 34–35.

¹²² See *Doe v. Kearney*, No. 8:00-cv-184-T-26B (transcript of hearing, held on June 19, 2001, at 49) (on file with author).

¹²³ See *supra* notes 108–14 and accompanying text.

¹²⁴ Transcript of hearing, *supra* note 122, at 49 (“[a] reasonable case worker in the position of Ms. O’Brien was justified in concluding that these children should have been taken”).

¹²⁵ See *Doe v. Kearney*, No. 8:00-cv-184-T-26B (M.D. Fla. June 26, 2002). A copy of the district court’s order is attached to the Does’ Petition for Writ of Certiorari filed with the Supreme Court of the United States. See *Doe v. Regier*, No. 03–174 (petition filed Aug. 1, 2003) (App. at 36). The Does immediately appealed the district court’s judgment in favor of O’Brien and what appeared to be a final judgment in favor of DCF. Because the district court’s judgment did not mention DCF, however, the Eleventh Circuit dismissed the appeal as premature on April 8, 2002, and remanded the matter back to the district court. On June 26, 2002, the district court reiterated its prior conclusions in favor of DCF and O’Brien and formally re-entered judgment in favor of all the defendants. The Does’ subsequent, unsuccessful appeal is reported as *Doe v. Kearney*, 329 F.3d 1286 (11th Cir. 2003).

¹²⁶ *Doe v. Kearney*, 329 F.3d 1286, 1299 (11th Cir. 2003).

*determines that there is insufficient time to obtain judicial permission before temporarily removing the child.*¹²⁷

The court was “not persuaded that due process demands such an inflexible rule.”¹²⁸ The constitutional inquiry, it concluded, should not be “blunt[ed] . . . by simply asking whether there was time to get a warrant.”¹²⁹ Traditional exigent circumstances are not always needed to avoid the Fourth and Fourteenth Amendments’ warrant requirements. Florida’s rescue law, as applied by O’Brien, was thus sustained. Going one step farther than even the district court, the Eleventh Circuit concluded that O’Brien had actual probable cause to rescue the children.¹³⁰ Because no constitutional violation occurred, the Eleventh Circuit affirmed the district court’s award of qualified immunity.¹³¹

C. Circuit Split

The Eleventh Circuit’s conclusion that O’Brien was justified in summarily removing the Does’ children—even though she had ample time to seek a court order—finds support in at least one other circuit court opinion. Like the Eleventh Circuit, the First Circuit concluded in *Tower v. Leslie-Brown* that the risk of harm to children by itself justifies dispensing with pre-rescue process.¹³² Traditional exigent circumstances are not required. In *Tower*, a Maine social worker and a state trooper summarily removed children from their mother’s custody following the arrest of their stepfather.¹³³ A warrant was not obtained until several hours later.¹³⁴ The mother (Tower) sued under § 1983 and complained that “no notice or hearing was given before the children were removed.”¹³⁵ The First Circuit disposed of this claim by holding that although generally “a deprivation of a fundamental right such as the custody of one’s children must be preceded by notice and an opportunity to be heard on the matter,”¹³⁶ where the safety of the child is at risk, an “adequate post-deprivation hearing within a reasonable time” is sufficient.¹³⁷ Like the Eleventh Circuit in *Doe*, the First Circuit concluded that

¹²⁷ *Id.* at 1295 (emphasis in original).

¹²⁸ *Id.*

¹²⁹ *Id.* at 1298.

¹³⁰ *Id.*

¹³¹ *Id.* at 1299.

¹³² *Tower v. Leslie-Brown*, 326 F.3d 290, 298 (1st Cir. 2003).

¹³³ *Id.* at 298.

¹³⁴ *Id.* at 299.

¹³⁵ *Id.* (citing *Suboh v. Dist. Attorney’s Office of Suffolk*, 298 F.3d 81, 94 (1st Cir. 2002)).

¹³⁶ *Id.* at 298.

¹³⁷ *Id.*

“state actors may take emergency measures and place a child in temporary custody before obtaining a court order when they have evidence that a child has been abused or is in imminent danger.”¹³⁸ Because an *ex parte* court order was obtained shortly after the removal, and a hearing was held five days later, the First Circuit found that procedural due process was satisfied.

Because *Tower* was handed down just days before *Doe*, the Eleventh Circuit did not cite it for support. It recognized, however, that its conclusion contradicted precedent from at least one other circuit.¹³⁹ The Second Circuit decided three years earlier in *Tenenbaum v. Williams* that prior judicial approval is ordinarily required in order to remove children from their parents’ custody and care.¹⁴⁰ Believing that a child (Sarah) might have been abused, New York social workers in *Tenenbaum* seized Sarah at her school without her parents’ knowledge or permission.¹⁴¹ The evidence of possible abuse came to the attention of the social workers on a Friday.¹⁴² By the following Monday, they decided to take Sarah into custody.¹⁴³ Sarah was not rescued, however, until noon on Tuesday.¹⁴⁴ Notwithstanding this delay, the social workers argued that the warrantless seizure was justified because there was reason to believe that Sarah had been abused and might be abused again.¹⁴⁵ Abuse, they urged, constitutes a categorical emergency that always justifies dispensing with warrants.¹⁴⁶ The Second Circuit disagreed. Over a lengthy dissent, it ruled that in the absence of reasonable cause to believe that a prior court order could not be obtained in a timely fashion, the removal of a child from its parents’ custody and care violates procedural due process.¹⁴⁷ Because “a properly instructed jury could conclude that at the time the caseworkers decided to remove Sarah, there was reasonably sufficient time, entirely consistent with Sarah’s safety, to seek a court order ...[,] there was no emergency.”¹⁴⁸ It explained:

If the danger to the child is not so imminent that there is reasonably sufficient time to seek prior judicial authorization, *ex parte* or otherwise, for the child’s removal, then the circumstances are not emergent; there is no reason to excuse the absence of the judiciary’s participation in depriving the parents of the care,

¹³⁸ *Tower v. Leslie-Brown*, 326 F.3d 290, 299 (1st Cir. 2003).

¹³⁹ See *Doe v. Kearney*, 329 F.3d 1286, 1296 (11th Cir. 2003).

¹⁴⁰ *Tenenbaum v. Williams*, 193 F.3d 581, 594 (2d Cir. 1999).

¹⁴¹ *Id.* at 587.

¹⁴² *Id.* at 588.

¹⁴³ *Id.* at 590.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 604.

¹⁴⁶ *Tenenbaum v. Williams*, 193 F.3d 581, 591 (2d Cir. 1999).

¹⁴⁷ *Id.* at 594–95.

¹⁴⁸ *Id.* at 595.

custody and management of their child. If, irrespective of whether there is time to obtain a court order, all interventions are effected on an "emergency" basis without judicial process, pre-seizure procedural due process for the parents and their child evaporates.¹⁴⁹

While the Eleventh Circuit noted its obvious disagreement with the Second Circuit, it attempted to distinguish holdings from other circuits that also appeared to generally demand prior judicial process. The Eleventh Circuit opined that "none of the[se] cases . . . supports the proposition that a child welfare worker must specifically determine whether there is time to obtain a court order before conducting an emergency removal."¹⁵⁰

To the extent the Eleventh Circuit was referring to holdings of the Fourth and Seventh Circuits, this conclusion seems solid. Decisions from these circuits ambiguously have held that emergency circumstances are needed to dispense with warrants, but never clearly stated that time is a central factor.¹⁵¹ Contrary to the Eleventh Circuit's conclusion, however, holdings of the Ninth and Tenth Circuits in *Mabe v. San Bernardino County Department of Public Social Services*¹⁵² and *Roska v. Peterson*¹⁵³ clearly support the Second Circuit. Both require warrants when temporally possible. Like the Second Circuit, both demand traditional exigent circumstances to justify dispensing with warrants.

In *Mabe*, social workers in California who removed a child (M.D.) from its home without a warrant were sued by M.D.'s parents for violating the Fourth and Fourteenth Amendments. The district court granted the social workers' motion for summary judgment based on qualified immunity. The Ninth Circuit reversed, finding that the plaintiff stated violations that were clearly established: "[g]overnment officials are required to obtain prior judicial authorization . . . unless they possess information at the time of the seizure that establishes 'reasonable cause to believe that the child is in imminent danger . . .'"¹⁵⁴ The Ninth Circuit relied on two prior decisions, *White v. Pierce County*¹⁵⁵ and

¹⁴⁹ *Id.* at 594-95 (citation omitted).

¹⁵⁰ *Doe v. Kearney*, 329 F.3d 1286, 1295 (11th Cir. 2003).

¹⁵¹ *See* *Brokaw v. Mercer County*, 235 F.3d 1000 (7th Cir. 2000); *Weller v. Dep't of Soc. Servs. for Baltimore*, 901 F.2d 387 (4th Cir. 1990); *see also* *Hooks v. Hooks*, 771 F.2d 935 (6th Cir. 1985). *Cf.* *Donald v. Polk County*, 836 F.2d 376 (7th Cir. 1988) (holding that parents suffered no injury even if child was improperly removed without warrant because child would have been removed anyway).

¹⁵² *Mabe v. San Bernardino County, Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1106 (9th Cir. 2001).

¹⁵³ *Roska v. Peterson*, 328 F.3d 1230, 1246 (10th Cir. 2003).

¹⁵⁴ *Mabe*, 237 F.3d at 1106 (quoting *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000)).

¹⁵⁵ *White v. Pierce County*, 797 F.2d 812, 815 (9th Cir. 1986).

Calabretta v. Floyd,¹⁵⁶ to define “imminent danger.”¹⁵⁷ In *White*, where the Ninth Circuit found no violation, a police officer who removed a child without seeking a warrant reasonably believed the child would be injured “if he delayed to get a warrant”¹⁵⁸ In *Calabretta*, meanwhile, where a potential violation was found, a police officer and social worker who conducted a warrantless removal “did not perceive any danger of injury to the children or loss of evidence if they secured a warrant.”¹⁵⁹ Finding that the facts in *Mabe* “appear to fall somewhere in between *Calabretta* and *White*,”¹⁶⁰ the Ninth Circuit remanded *Mabe* to the trial court to address whether “the child would be harmed in any time it would take to obtain a warrant.”¹⁶¹

The Ninth Circuit’s decision in *Wallis v. Spencer* reached what appears to be the same conclusion.¹⁶² There, police removed two children, aged two and five, from their parents based on an abuse allegation made by a relative.¹⁶³ They had no warrant; rather, the police claimed to have probable cause to believe the children would be abused in the future.¹⁶⁴ The district court granted summary judgment to the defendants, finding that “the Police Department had reasonable cause to remove the children from their parents’ custody with or without a court order”¹⁶⁵

The Ninth Circuit reversed.¹⁶⁶ It found triable issues of fact regarding both the reasonableness of the officers’ actions and the need for immediate removal:

¹⁵⁶ *Calabretta v. Floyd*, 189 F.3d 808, 813 nn.9 & 12 (9th Cir. 1999).

¹⁵⁷ *Mabe*, 237 F.3d at 1107.

¹⁵⁸ *Calabretta*, 189 F.3d at 814 (describing *White*, 797 F.2d 812).

¹⁵⁹ *Id.*

¹⁶⁰ *Mabe v. San Bernardino County, Dep’t of Pub. Soc. Servs.*, 237 F.3d 1101, 1107 (9th Cir. 2001).

¹⁶¹ *Id.* (citation omitted). Taking the facts in the light most favorable to the plaintiff, the Ninth Circuit concluded that there was no “concern that the child would be concealed or further abused *during the time it would take to get a warrant*” *Id.* at 1108 (emphasis added). Even though probable cause may have existed to support removal, moreover, “a showing of probable cause does not satisfy the conclusion that M.D. was in imminent danger” *Id.* at 1108 n.2 (citation omitted). *See also* *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000) (citing *Mincey v. Arizona*, 437 U.S. 385, 394 (1978), to describe “imminent danger” in context of child abuse investigation).

¹⁶² *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000).

¹⁶³ *Id.* at 1131.

¹⁶⁴ *Id.* at 1143.

¹⁶⁵ *Id.* at 1136.

¹⁶⁶ *Id.* at 1145.

Officials may remove a child from the custody of its parent without prior judicial authorization only if the information they possess at the time of the seizure is such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury.¹⁶⁷

Not only must police reasonably investigate before removing children,¹⁶⁸ the “scope and degree of the state interference [must be] justified by the alleged exigency.”¹⁶⁹ A jury could find that police lacked probable cause, did not properly investigate the allegation, or overreacted by removing the children without judicial assistance.¹⁷⁰

Similarly, in *Roska v. Peterson*, social workers removed a child from its home without “even attempt[ing] to obtain an *ex parte* order.”¹⁷¹ Reversing the District Court’s grant of summary judgment for the defendants (based on qualified immunity), the Tenth Circuit concluded that “exceptional,” “exigent” circumstances are always needed to excuse the Fourth and Fourteenth Amendments’ warrant requirements.¹⁷² Finding this rule clearly established since 1999,¹⁷³ the court remanded the case to the trial court to address whether circumstances of this nature existed.¹⁷⁴

The *Roska* court’s description and application of the exigent circumstances exception reveal that it was most certainly relying on traditional Fourth and Fourteenth Amendment standards. Circumstances suffice, according to the Tenth Circuit, only when they render delay dangerous and make it impracticable to seek

¹⁶⁷ *Id.* at 1138.

¹⁶⁸ *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000).

¹⁶⁹ *Id.* at 1140.

¹⁷⁰ The Ninth Circuit explained:

Because the swing of every pendulum brings with it potential adverse consequences, it is important to emphasize that in the area of child abuse, as with the investigation and prosecution of all crimes, the state is constrained by the substantive and procedural guarantees of the Constitution. The fact that the suspected crime may be heinous—whether it involves children or adults—does not provide cause for the state to ignore the rights of the accused or any other parties. Otherwise, serious injustices may result. In cases of alleged child abuse, governmental failure to abide by constitutional constraints may have deleterious long-term consequences for the child and, indeed, for the entire family. Ill-considered and improper governmental action may create significant injury where no problem of any kind previously existed.

Id. at 1130–31.

¹⁷¹ *Roska v. Peterson*, 328 F.3d 1230, 1246 (10th Cir. 2003).

¹⁷² *Id.* at 1240.

¹⁷³ *Id.* at 1250.

¹⁷⁴ *Id.* at 1254.

a warrant. “Although defendants at times assert that *a delay to obtain a warrant* might have cost [the child] his life, the evidence shows otherwise.”¹⁷⁵

[U]nless the child is in imminent danger, there is no reason that it is *impracticable* to obtain a warrant before social workers remove a child from the home. Defendants took the time to seek the advice of an Assistant Utah Attorney General before proceeding with the removal; surely they could have *taken the time* to incur the minimal inconvenience involved in obtaining a warrant.¹⁷⁶

Citing the definition of “exceptional circumstances” provided by the Supreme Court’s decision in *Mincey v. Arizona*,¹⁷⁷ the Tenth Circuit flatly rejected a “special needs” exception that would have excused warrants in child abuse cases.¹⁷⁸

With *Doe* and *Tower* on one side, and *Tenenbaum*, *Mabe*, and *Roska* on the other, a clear split has emerged over the constitutional propriety of rescuing children without either prior judicial process or exigent circumstances. The Fourth and Fourteenth Amendments, as these decisions demonstrate, admit no easy answers. In fact, the Court’s constitutional rules and exceptions are so muddled

¹⁷⁵ *Id.* at 1240 (emphasis added).

¹⁷⁶ *Id.* at 1242 (emphasis added). At least one court has concluded that *Roska* demanded traditional exigent circumstances in the context of child rescues. See *Walsh v. Erie County Dep’t of Job & Family Servs.*, 240 F. Supp. 2d 731, 747 (N.D. Ohio 2003) (citing *Roska* for the proposition that “warrantless no-knock entry violated Fourth Amendment absent exigency of imminent danger to child’s welfare”).

¹⁷⁷ *Mincey v. Arizona*, 437 U.S. 385, 390 (1978). *Mincey* rejected categorical exceptions dispensing with the need for exigent circumstances—such as one based on the seriousness of the criminal offense—in the criminal context: “there were no exigent circumstances in this case There was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant And there is no suggestion that a search warrant could not easily and conveniently have been obtained.” *Id.* at 394. *Mincey* clearly holds that when searching homes for evidence of crime, police need either warrants or exigent circumstances—defined as whether time suffices to seek a warrant. *Id.*

¹⁷⁸ *Roska v. Peterson*, 328 F.3d 1230, 1248 (10th Cir. 2003). On slightly different facts, *Roe v. Tex. Dep’t of Protective and Regulatory Servs.*, 299 F.3d 395 (5th Cir. 2002), strongly suggests that the Fifth Circuit’s view falls in line with that of the Second, Ninth, and Tenth Circuits. *Roe* explored the propriety of warrantless strip searches designed to uncover evidence of child abuse. In *Roe*, the Texas officials concluded that a child (Jackie) may have been sexually abused. During her first contact with Jackie, a social worker strip-searched her in an effort to uncover evidence of abuse. The Fifth Circuit rejected the state’s argument that “special needs” justified dispensing with the traditional exigent circumstances requirement. Where “a child protective services search is . . . intimately intertwined with law enforcement traditional Fourth Amendment” standards apply. 299 F.3d at 407. Where “exigent circumstances” exist, no warrant is required. *Id.* (citing *Tenenbaum v. Williams*, 193 F.3d 581, 604–05 (2d Cir. 1999)). “In non-exigent circumstances, the worker then *has time to obtain a warrant* either personally to conduct a visual body cavity search or to have a physician perform it.” *Id.* (emphasis added).

that deductive tools alone cannot produce a proper result. While Supreme Court doctrine and constitutional comparisons must be considered, it is also important to explore the history that surrounds child protection and rescue. Before turning to the various constitutional doctrines and results handed down by the high Court, the next Part briefly summarizes the history of rescue and removal in America.

III. REMOVAL'S HISTORY IN THE UNITED STATES

A. *Why Remove Children?*

A father's right to the care, custody, and control of his children is of ancient origin. Blackstone's Commentaries, published in 1765, observed that "[t]he ancient Roman laws gave the father a power of life and death over his children; upon this principle, that he who gave had also the power of taking away"¹⁷⁹ Blackstone observed that "children lived in 'the empire of the father' until they reached twenty-one,"¹⁸⁰ and the father's common law "right to the custody, labor, and earnings of his minor children" was sacred.¹⁸¹ Government had little (if any) room to interfere with a father's right to his children.

This common law deference, however, was due only affluent parents. English Poor Laws, which were a "response to the social and economic changes of the declining feudal age,"¹⁸² modified parental rights by authorizing the removal of children from poor families.¹⁸³ Following removal, children were often impressed into the service of more prosperous families.¹⁸⁴ A dual system of family law thus emerged in England prior to the American Revolution. "[T]he family law of the poor . . . [which] evolved as an integral part of the labor and poor law systems, was the creation of Parliament and was then as today primarily statutory. The family law of the rest of the community was created by the common-law courts."¹⁸⁵ While rich children enjoyed familial privilege, poor children experienced a state-supported system that closely approached slavery.¹⁸⁶

¹⁷⁹ Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 310 (2002) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *440).

¹⁸⁰ *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *441).

¹⁸¹ *Id.* at 310.

¹⁸² Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205, 210 (1971).

¹⁸³ See Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status*, 16 STAN. L. REV. 257, 279 (1964).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 261. See also Rendleman, *supra* note 182, at 211 (observing that Blackstone recognized this distinction).

¹⁸⁶ Rendleman, *supra* note 182, at 212.

The American colonies received and recognized this dual system. "Seventeenth century laws of Maryland, Massachusetts, New York, and Pennsylvania, for example, specifically authorized magistrates to 'b[i]nd out' or indenture children of the poor over parental objections."¹⁸⁷ Because prosperous parents in the late eighteenth century continued to enjoy complete control over their children, it is impossible to draw any singular conclusion about what the federal Framers thought about familial rights and "child abuse." Not only was child abuse unknown to the Framers, no remedial mechanism existed for rectifying abusive parental practices as opposed to poverty.

States' attitudes toward families living in poverty changed little between the Revolution and the Civil War.¹⁸⁸ Still, an onslaught of immigration forced many states to modify their placement systems. Rather than rely on apprenticeships and indentures, the first half of the nineteenth century brought reformatories and "houses of refuge." As an adjunct to almshouses, which focused on poor adults, the "House of Refuge Movement" facilitated the institutionalization of poor children.¹⁸⁹ New York's law (enacted in 1824), for example, provided a charter to the Society for the Reformation of Juvenile Delinquents to erect a "House of Refuge" for minor vagrants, delinquents, and criminals.¹⁹⁰ Their names notwithstanding, these Houses of Refuge were not designed to shelter or protect abused children; rather, "the undertaking was a matter of crime and delinquency prevention, aimed at saving predelinquent youth."¹⁹¹ The Movement's essential thesis was that poverty correlated with "moral degeneracy."¹⁹² Removing poor children (and their parents) from the population-at-large ridged society of actual or potential moral deviants, offered correction, and furthered crime-control.¹⁹³

True reform efforts geared toward protecting children did not emerge until after the Civil War. And even then, "reform" was guarded and cautious. The

¹⁸⁷ Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 702 (1998).

¹⁸⁸ tenBroek, *supra* note 183, at 297.

¹⁸⁹ See Marvin Ventrell, *From Cause to Profession: The Development of Children Law and Practice*, 32-JAN COLO. LAW. 65, 66 (2003).

¹⁹⁰ See Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1190 (1971).

¹⁹¹ *Id.* at 1190-91.

¹⁹² *Id.* at 1199.

¹⁹³ See *id.* at 1207 ("The presumption remained that this was all a means to the end of crime prevention."); Rendelman, *supra* note 182, at 244.

[I]t is evident from the decisions that small children were being taken from their parents not because there was any breach of the criminal law by either the parents or the children and not because of any intentional failing of the parents, but simply because the parents were poor and behaved as poor people always have.

Id.

genesis of this late nineteenth century reform movement can be found in two celebrated child abuse cases tried in New York City in 1871 and 1874, respectively.¹⁹⁴ Both cases involved children who had been horribly abused by their parents. Henry Bergh, the founder of New York's Society for Prevention of Cruelty to Animals, used

a writ *de homine replegiando* (similar to a writ of *habeas corpus*), . . . to remove the girls and ultimately have them placed by the New York Special Sessions Court in safe care. It is not clear under what authority the court acted; it probably saw itself as exercising its equitable authority, having taken criminal jurisdiction over the abusers.¹⁹⁵

These two cases spawned creation of the New York Society for the Prevention of Cruelty to Children in 1874.¹⁹⁶ In the years that followed, more and more cities followed suit. "Led by wealthy private philanthropists, [these societies] amassed unprecedented legal authority to scrutinize parental behavior, arrest parents, and remove thousands of children."¹⁹⁷

Even though the New York Reform Movement's mandate was protection, pure and simple, it continued to labor under a distinction between rich and poor. "From the start, [the New York Society] focused on families that had not been successful in the wage labor economy, operating on the principle that this economic failure had been caused by some crucial moral or character flaw."¹⁹⁸

Over the entire course of the nineteenth century, common law courts and legal writers in the United States remained highly respectful of the control that parents, particularly fathers, exercised over their households and children, and committed to doctrines that made legal intervention to counter parental excess or abuse very unlikely.¹⁹⁹

So long as a father provided for his children in a "proper" way—one defined by the various charitable, religious, and philanthropic organizations that administered the reform laws—there was little chance of official intervention. Discipline that today would clearly be labeled abusive fell beyond the bounds of governmental control.

¹⁹⁴ See Ventrell, *supra* note 189, at 66 (discussing cases involving Emily (1871) and Mary Ellen (1874)).

¹⁹⁵ See Ventrell, *supra* note 189, at 66. See also Davidson, *supra* note 13, at 766 (describing Bergh's use of a "special habeas corpus-type writ" to remove the children).

¹⁹⁶ Ventrell, *supra* note 189, at 67.

¹⁹⁷ Hasday, *supra* note 179, at 302.

¹⁹⁸ Hasday, *supra* note 179, at 304–05.

¹⁹⁹ Hasday, *supra* note 179, at 311.

At the close of the nineteenth century, the New York Reform Movement—which to this time had been primarily private (though officially chartered)—ceded control to state and local administrative bodies. “[C]hildren’s guardians’ boards were created, marking the beginning of government taking primary responsibility for aiding abused, neglected, and abandoned children rather than, as in earlier times, the charitable sector, such as Societies for Prevention of Cruelty to Children, Children’s Aid Societies, and religious groups.”²⁰⁰ Cook County, Illinois created the first juvenile court in 1899, which served as a prototype for modern governmental oversight of juvenile delinquents in America.²⁰¹

Eighteenth and nineteenth century America’s division between rich and poor manifested itself in at least two important ways. First, juvenile *dependency* in eighteenth and nineteenth century America was not distinguished from juvenile *delinquency*. “[T]he distinction between neglected children and delinquent children, which is of great importance in the twentieth century, had virtually no meaning in the nineteenth-century predelinquency system.”²⁰² Second, poor children were targeted because they were delinquent and likely to become criminals, not because they were dependent and abused. Simply put, nineteenth century America’s *parens patriae* interest in children was a function of crime-control,²⁰³ not the well-being of children. Protection was important, but it was protection of society from children, rather than protection of children from their parents.

America’s use of poverty to justify removal did not change until the first quarter of the twentieth century, when states began passing “mothers’ pension laws.”²⁰⁴ These measures, passed by a large majority of states by 1920,

authorized local governments to provide direct financial support to poor mothers, [and] differed from the child cruelty societies in two important institutional respects First, [they] established completely governmental programs Second, and more crucially, [they] primarily accomplished their aims through the provision and refusal of much needed financial aid, building on a growing consensus among reformers of the period that this strategy was both more effective, and more cost-efficient, than removing children from their parents’ custody.²⁰⁵

²⁰⁰ Davidson, *supra* note 13, at 766.

²⁰¹ See *In re Gault*, 387 U.S. 1, 15 (1967) (crediting Cook County as the prototype for modern governmental oversight of American juvenile delinquents).

²⁰² Fox, *supra* note 190, at 1192.

²⁰³ Fox, *supra* note 190, at 1193.

²⁰⁴ See Hasday, *supra* note 179, at 348.

²⁰⁵ Hasday, *supra* note 179, at 348.

While it appears that mothers' pension laws perpetuated much of the nineteenth century's moral philosophy,²⁰⁶ their advent still marked an important turning point in poor families' rights. Even the poor were allowed to have (and keep) families.

"[By] mid century all states had government agencies that provided statewide services to abused, neglected, and abandoned children."²⁰⁷ This was fueled in part by federal spending measures, such as the Aid to Dependent Children Act, which was passed as part of the Social Security Act of 1935.²⁰⁸ At approximately this same time, the medical community also took note of child abuse. In 1946, Dr. John Caffey reported the case histories of six "battered" children.²⁰⁹ The dialogue that followed "began the modern era in our understanding of child abuse and our response to it."²¹⁰

In 1961, the American Academy of Pediatrics organized its first conference on "The Battered Child Syndrome."²¹¹ The first model child abuse law was drafted at this conference.²¹² The following year, a report by the same name was published in the Journal of the American Medical Association.²¹³ This report "brought the problem [of child abuse] to a wider audience, not only in medicine but in government as well"²¹⁴ By 1966, "every state in the Union passed a child-abuse reporting law."²¹⁵

In 1974, Congress's enactment of the Child Abuse Prevention and Treatment Act (CAPTA)²¹⁶ marked "its first direct action to address child maltreatment within the home"²¹⁷ This Act conditioned federal grants on the development of programs geared toward preventing child abuse. "Child abuse," in turn, was defined by CAPTA as "physical or mental injury, sexual abuse, negligent treatment, or maltreatment of a child under the age of eighteen by a person who is responsible for the child's welfare under circumstances which indicate that the

²⁰⁶ See Hasday, *supra* note 179, at 348.

²⁰⁷ Davidson, *supra* note 13, at 766.

²⁰⁸ See Hasday, *supra* note 179, at 357. This federal statute was renamed Aid to Families with Dependent Children (AFDC) in 1962. *Id.*

²⁰⁹ See Richman, *supra* note 65, at 220.

²¹⁰ Richman, *supra* note 65, at 220.

²¹¹ See Richman, *supra* note 65, at 220.

²¹² Richman, *supra* note 65, at 220.

²¹³ See Richman, *supra* note 65, at 220.

²¹⁴ Richman, *supra* note 65, at 220.

²¹⁵ Richman, *supra* note 65, at 220.

²¹⁶ See Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, § 3, 88 Stat. 4 (1974).

²¹⁷ Davidson, *supra* note 13, at 767.

child's health or welfare is harmed or threatened thereby"²¹⁸ In 1980 and 1997, Congress passed additional spending measures, the Adoption Assistance and Child Welfare Act²¹⁹ and the Adoption and Safe Families Act,²²⁰ respectively. Both measures attempted to weigh historical preferences for biological families and parental rights against evolving community concerns for children's safety. The 1980 Act conditioned removal and termination of parental rights on a state's making "reasonable efforts" to correct familial problems.²²¹ The 1997 Act, in turn, continued to insist that states make "reasonable efforts" to restore families, but also encouraged timely adoption as a viable alternative.²²² Although this teetering balance has yet to be solved, it is thus clear today that "dependency" in the United States is primarily, if not exclusively, a function of child safety.

B. *How to Remove Children?*

While the substantive evolution of delinquency–dependency laws in the United States is relatively clear, the procedural developments that accompanied them are murky. At common law, procedural protections for poor parents did not exist. Church wardens and overseers had absolute discretion to remove poor children from their homes and press them into the service of others.²²³ There was no such thing as judicial review, either before or after a child's removal. This approach was apparently adopted throughout the colonies prior to the American Revolution and remained following the adoption of the Federal Constitution.²²⁴

²¹⁸ Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, § 3, 88 Stat. 4, 5 (1974).

²¹⁹ Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272, 94 Stat. 500 (1980).

²²⁰ Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

²²¹ See Dolce, *supra* note 16, at 556 (observing that the "Adoption Assistance and Child Welfare Act of 1980 ("AACWA") . . . sought to better ensure that children are only removed from their families of origin if 'reasonable efforts' are made to prevent the need for removal.").

²²² See GAO REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON HUMAN RESOURCES, COMMITTEE ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES, *supra* note 17, at 1 (explaining that the 1997 Act "clarifying the circumstances under which states are not required to try to prevent a child's removal from home or to return a foster child home allows states to forgo services to preserve or reunite the biological family").

²²³ See Ventrell, *supra* note 189, at 66; tenBroek, *supra* note 183, at 279.

²²⁴ However, it is worth noting that the colonies received—and ultimately rejected—many British practices, including groundless, arbitrary searches of homes and businesses. See Jonathan L. Hafetz, "A Man's Home is His Castle?": Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries, 8 WM. & MARY J. WOMEN & L. 175, 203 (2002). The Fourth Amendment, according to modern wisdom, placed the judiciary between executive license and American privacy.

States in antebellum America, which remained free from the constraints of the Federal Constitution,²²⁵ appear to have acquiesced in this practice. At least, there is no authority suggesting they did not. During the House of Refuge Movement in the first half of the nineteenth century, delinquent children were regularly snatched from the streets and sent to institutions.²²⁶ Still, there is some evidence of judicial review during this formative period. In the famous case of *Ex parte Crouse*,²²⁷ a young girl was committed to government's care "by virtue of a warrant under the hand and seal of . . . a justice of the peace of the county of Philadelphia . . ."²²⁸ The girl's mother initiated the commitment proceedings after concluding that her daughter "by reason of vicious conduct, has rendered her control beyond [her] power . . ."²²⁹ The relevant Pennsylvania statute, passed in 1835, authorized commitment for this reason, but only by an "alderman or justice of the peace."²³⁰ It was apparently not enough that the mother wanted the child committed; an alderman or justice of the peace had to agree. Moreover, while the father's subsequent habeas corpus challenge proved unsuccessful,²³¹ his use of the great writ demonstrates that some form of judicial review was available as early as the middle of the nineteenth century. Read optimistically, *Crouse* reflects two layers of judicial review: one before commitment (by an alderman or justice of the peace) and one after (through the great writ of habeas corpus). Granted, *Crouse* did not speak to whether a child could be temporarily institutionalized

²²⁵ See *Barron v. Mayor of Baltimore*, 32 U.S. 243, 250 (1833) (observing that protections in Bill of Rights were not intended to apply to states and their local agencies).

²²⁶ See Janet Gilbert, Richard Grimm & John Parnham, *Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, 52 ALA. L. REV. 1153, 1158 (2001) (describing history of the House of Refuge Movement).

²²⁷ *Ex parte Crouse*, 4 Whart. 9, 9 (Pa. 1839).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ At length, the statute authorized the House of Refuge to take custody

in either of the following modes, viz. First: infants committed by an alderman or justice of the peace on the complaint and due proof made to him by the parent, guardian or next friend of such infant, that by reason of incorrigible or vicious conduct such infant has rendered his or her control beyond the power of such parent Second: infants committed by the authority aforesaid, where complaint and due proof have been made [because] . . . of vagrancy, or of incorrigible or vicious conduct, and that from the moral depravity or otherwise of the parent or next friend in whose custody such infant may be, such parent or next friend is incapable or unwilling to exercise the proper care and discipline over such incorrigible or vicious infant. Third: infants committed by the Courts of this commonwealth in the mode provided by the act to which this is a supplement [meaning the Act of 1826, which authorized detention based upon vagrancy, criminal charge, or criminal conviction].

Id. at 10.

²³¹ *Id.* at 12.

during the course of the commitment proceeding. It addressed only the terminal issue of whether the child's commitment was valid.²³²

As described above,²³³ private societies that emerged as part of New York's Reform Movement in the last quarter of the nineteenth century exercised enormous power and discretion. Although Henry Bergh resorted to habeas corpus to rescue Emily and Mary Ellen,²³⁴ society agents most often simply "followed children back to their homes,"²³⁵ arrested their parents, and seized the children.²³⁶ Because removals were parcel to the arrests of the parents, they seem to have occurred without prior or accompanying judicial process. Process came, if at all, as part of the criminal proceedings against the parents. "Once a child had been removed from her parents at the New York society's instigation or with its help," moreover, "the courts were extremely reluctant to allow visitation or to release the child, unless the society agreed."²³⁷

The first half of the twentieth century saw little change in the procedures that accompanied removals. Judicial review was available but tended to follow removal rather than precede it. While the law of search and seizure evolved to safeguard adults in the latter half of the twentieth century,²³⁸ these new-found procedural protections were seldom extended to juveniles.²³⁹ In many states, for example, juveniles were subject to arrest with or without warrants, regardless of traditional probable cause.²⁴⁰ As the Supreme Court explained in *In re Gault*, "[t]he early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals."²⁴¹ They thus discarded the "apparent rigidities, technicalities, and harshness which they observed in both substantive and

²³² *Id.* at 11.

²³³ See *supra* notes 194–99 and accompanying text.

²³⁴ See *supra* notes 194–95 and accompanying text.

²³⁵ Hasday, *supra* note 179, at 307.

²³⁶ Hasday, *supra* note 179, at 307.

²³⁷ Hasday, *supra* note 179, at 308. In twenty years (1881–1900), the New York society "brought 52,860 criminal cases, resulting in 49,330 convictions (a 93.3% success rate). During the same period, the society removed 90,078 children with judicial approval. It exercised enormous discretion over their placement, and put the overwhelming majority in institutions." *Id.* at 307–08.

²³⁸ See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that all evidence seized in violation of the Fourth Amendment is subject to exclusionary rule).

²³⁹ See *In re Gault*, 387 U.S. 1, 14 (1967) ("In practically all jurisdictions, there are rights granted to adults which are withheld from juveniles.").

²⁴⁰ See *id.* at 11 n.7 (observing that Arizona's arrest law did not protect juveniles).

²⁴¹ *Id.* at 15.

procedural criminal law” for juvenile delinquents.²⁴² In their stead, reformers left juveniles with promises of compassion and fairness as opposed to due process.²⁴³

Gault, decided in 1967, was a watershed for juvenile rights. The Court in *Gault* held that while juveniles are entitled to some form of due process in the context of delinquency proceedings, they do not necessarily enjoy all the protections enjoyed by adults.²⁴⁴ The Court did not address pre-trial procedures, such as arrests and practices surrounding pre-trial detentions, nor did it import adults’ protections jot-for-jot into the realm of juvenile delinquency.²⁴⁵ Still, its holding made clear that juveniles are entitled to *some* constitutional protections.²⁴⁶ More importantly, it emphasized the inherent value of process: “Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy.”²⁴⁷ The Court thus ruled that juveniles are entitled to proper notice, counsel, and an opportunity to defend themselves at trial.²⁴⁸

Following *Gault*’s landmark holding that children enjoy constitutional protections, the National Conference of Commissioners on Uniform State Laws prepared the Uniform Juvenile Court Act of 1968 (the Model Act)²⁴⁹ to implement needed changes in America’s juvenile justice system.²⁵⁰ As was the accepted historical norm, § 13 of the Model Act addressed dependent and delinquent children together:

- (a) A child may be taken into custody:
 - (1) pursuant to an order of the court under this Act;
 - (2) pursuant to the laws of arrest;

²⁴² *Id.*

²⁴³ *See id.* at 18 (“Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.”).

²⁴⁴ *See e.g.,* *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (plurality) (holding that juveniles are not entitled to juries in delinquency proceedings). Justice Blackmun observed in *McKeiver* that “[t]he Court . . . has not yet said that all rights constitutionally assured to an adult . . . are to be enforced or made available to the juvenile in his delinquency proceeding.” *Id.* at 533.

²⁴⁵ *In re Gault*, 387 U.S. 1, 13 (1967).

²⁴⁶ *Id.* at 55.

²⁴⁷ *Id.* at 19–20.

²⁴⁸ *Id.* at 41.

²⁴⁹ The Uniform Juvenile Court Act, which was approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1968, was officially changed to a Model Act in 1985. *See* MODEL JUVENILE COURT ACT, Historical Notes, 9A U.L.A. 1 (1968). The Model Act was withdrawn in 1996 as being obsolete.

²⁵⁰ *Id.*

(3) by a law enforcement officer [or duly authorized officer of the court] if there are reasonable grounds to believe that the child is suffering from illness or injury or is in immediate danger from his surroundings, and that his removal is necessary; or

(4) by a law enforcement officer [or duly authorized officer of the court] if there are reasonable grounds to believe that the child has run away from his parents, guardian, or other custodian.

(b) The taking of a child into custody is not an arrest, except for the purpose of determining its validity under the constitution of this State or of the United States.²⁵¹

Notwithstanding their inclusion in a single statute, delinquent and dependent children were still treated quite differently. Delinquent children were subject to the “laws of arrest,” which, at that time, most often authorized unconditional, unilateral action by police. Dependent children, those who suffered “illness . . . injury or [were] in immediate danger,” meanwhile, could be summarily removed—that is, without prior judicial authorization—by a law enforcement officer only when “necessary.”²⁵² For dependents, judicial authorization *ex ante* was preferred, as made clear by sections 14 and 15 of the Model Act. Section 14 required that children who had been removed without court orders

not be detained or placed in shelter care prior to the hearing on the petition unless [the child’s] detention or care is required to protect the person or property of others or of the child or because the child may abscond or be removed from the jurisdiction of the court or because [the child] has no parent, guardian, or custodian or other person able to provide supervision and care for [the child] and return [the child] to the court when required . . .²⁵³

Section 15, in turn, required that a “person taking a child into custody, with all reasonable speed and without first taking the child elsewhere . . . release the child to his parents . . . upon their promise to bring the child before the court when requested . . . unless his detention or shelter is warranted or required under section 14 . . .”²⁵⁴ Read together, sections 13, 14, and 15 of the Model Act expressed a clear preference for judicial involvement and supervision. Section 13’s necessity requirement allowed unilateral, summary action only when needed to

²⁵¹ MODEL JUVENILE COURT ACT, § 13, 9A U.L.A. 22 (1968). The Model Act, its drafters observed, “provides for judicial intervention when necessary for the care of deprived children and for the treatment and rehabilitation of delinquent and unruly children, but under defined rules of law and through fair and constitutional procedure.” MODEL JUVENILE COURT ACT, Prefatory Note, 9A U.L.A. 2 (1968).

²⁵² MODEL JUVENILE COURT ACT, § 13, 9A U.L.A. 22–23 (1968).

²⁵³ *Id.* § 14.

²⁵⁴ *Id.* § 15(a)(1).

immediately protect children or prevent flight. In the absence of these pressing needs, the Model Act called for pre-deprivation process.²⁵⁵

IV. CONSTITUTIONAL COMPARISONS: WHERE DOES RESCUE FIT IN?

A. *Constitutional Family Law*

The Supreme Court has long recognized a basic, fundamental right to raise children.²⁵⁶ The Court's holdings, moreover, have always assumed that this right is shared by rich and poor alike. Four generations ago, the Supreme Court in *Meyer v. Nebraska* ruled that parents have a fundamental right to choose what is best for their children.²⁵⁷ In *Meyer*, the Court struck down as violative of substantive due process a state law that forbade the teaching of various languages in private schools.²⁵⁸ The Court's logic was grounded in *Lochner v. New York*, which rather ignobly held that bakers have a constitutional right to contract as they see fit, free from governmental constraint.²⁵⁹ Parents, too, are endowed with a fundamental liberty of contract, such that they have the right to choose the content of their children's education. Two years later, the Court employed similar

²⁵⁵ While it is not clear that "necessary" equates with the constitutional understanding of "exigent circumstances" expressed in *Mincey v. Arizona*, 437 U.S. 385 (1978), such a correlation makes sense. Warrantless removals are only necessary when warrants are not immediately obtainable. Warrants are not immediately obtainable because of exigent circumstances. Georgia, which adopted the Model Act in 1971, seems to have recognized this logic. See Michael R. Beeman, Note, *Investigating Child Abuse: The Fourth Amendment and Investigatory Home Visits*, 89 COLUM. L. REV. 1034, 1053 n.147 (1989) (noting that *Mincey*'s exigency requirement was properly applied to a child abuse investigation in *Coker v. State*, 164 Ga. App. 493, 496-97, 297 S.E.2d 68, 71-72 (1982)). Wisconsin, however, which also adopted the Model Act, appears to have gone in the other direction, allowing warrantless searches in child abuse investigations that would not likely survive scrutiny in other contexts. See *State v. Boggess*, 115 Wis. 2d 443, 456, 340 N.W.2d 516, 524 (1983) (suggesting that Wisconsin's necessity exception in the context of child abuse differs from *Mincey*'s description of exigent circumstances) (cited in Beeman, *supra*, at 1053 n.147).

²⁵⁶ The Supreme Court has not decided whether children have an identical or symmetrical right to be cared for by their parents. See *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1988) (plurality) ("We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship."). For an excellent discussion of children's emerging rights under the Fourteenth Amendment, see David D. Meyer, *The Modest Promise of Children's Relationship Rights*, 11 WM. & MARY BILL RTS. J. 1117 (2003) (observing that, while parental rights are well-established, children's rights are still developing).

²⁵⁷ *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down state law that prevented teaching of German to children in schools).

²⁵⁸ *Id.* at 403.

²⁵⁹ *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a New York law that limited hours of employment for bakers).

logic to strike down an Oregon law that mandated public education. In *Pierce v. Society of Sisters*, the Court held that parents are constitutionally free to send their children to private schools if they choose.²⁶⁰ While the *Lochneresque* logic used in those two cases has been swept away, their authority stands to this day. Whether a function of substantive familial rights under the Due Process Clause, or protected speech and association under the First Amendment, *Meyer* and *Pierce* remain solid.

By 1972, when the Court decided in *Stanley v. Illinois*²⁶¹ that neither fathers nor mothers can have their children taken from them absent a particularized showing that they are “unfit” as parents,²⁶² it was clear that parents enjoyed exceptional protections under the Federal Constitution. The Court in *Stanley* stated emphatically that a parent’s right to his children is fundamental—“It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children ‘come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements’”²⁶³—a conclusion that has been reiterated in later opinions. In *Troxel v. Granville*, for example, which struck down Washington’s grandparent-visitation law, Justice O’Connor stated that “it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”²⁶⁴ These rights, Justice O’Connor observed, are “perhaps the oldest of fundamental liberty interests recognized by this Court.”²⁶⁵

The Court has also recognized procedural protections for parents. Importantly, in *Stanley*, the Court “conclude[d] that, as a matter of due process of

²⁶⁰ *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 536 (1925) (striking down state a law that prohibited parents from sending children to private schools).

²⁶¹ *Stanley v. Illinois*, 405 U.S. 645 (1972) (concluding that fathers’ children cannot be taken from them absent findings that they are unfit).

²⁶² In *Stanley*, the “Court held that the State of Illinois was barred, as a matter of both due process and equal protection, from taking custody of the children of an unwed father, absent a hearing and a particularized finding that the father was an unfit parent.” *Quilloin v. Walcott*, 434 U.S. 246, 247–48 (1978).

²⁶³ *Stanley*, 405 U.S. at 651 (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949)).

²⁶⁴ *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion). Justices Souter, *id.* at 77, and Thomas, *id.* at 80, concurred in Justice O’Connor’s conclusion that parental rights are generally protected by substantive due process.

²⁶⁵ *Id.* at 65. This is not to say that parents have an absolute right to direct the actions of their children. In *Prince v. Massachusetts*, 321 U.S. 158 (1944), for example, the Court ruled that a law prohibiting the sale of merchandise in public places by minors could be applied to a child distributing literature at the behest of her guardian. The state’s interest in the well-being of children sometimes overrides parental controls. *Cf. Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that parents have a constitutional right to keep their children out of school after a certain age).

law, Stanley was entitled to a hearing on his fitness as a parent *before* his children were taken from him”²⁶⁶ Although the Court was speaking to procedural protections that must accompany permanent (as opposed to temporary) deprivations, much of its logic would seem to extend to rescues. The Court, after all, observed that even temporary separation can cause suffering: “Surely, in the case before us, if there is delay between the doing and the undoing petitioner suffers from the deprivation of his children, and the children suffer from uncertainty and dislocation.”²⁶⁷ *Stanley* thus seems to stand for the proposition that interference in family matters ought to be avoided whenever possible. Respect for familial autonomy would be furthered not only by judicial filters that precede permanent separations, but also by judicial filters that come before temporary removals.

Several Supreme Court opinions flesh out these procedural protections, yet none address the propriety of warrantless rescues. In *Lassiter v. Department of Social Services*, the Court suggested that indigent parents may, under certain circumstances, be entitled to the appointment of counsel in termination proceedings.²⁶⁸ In *Santosky v. Kramer*, the Court concluded that a termination of parental rights must be supported by clear and convincing evidence.²⁶⁹ More recently, in *M.L.B. v. S.L.J.*, the Court held that an indigent parent is entitled to a “record of sufficient completeness” to enable an appellate court to thoroughly review a termination order.²⁷⁰

The procedural protections afforded non-fundamental interests attest to the obvious importance of parental rights. The Court has been quite flexible in terms of the process necessarily due aggrieved persons when garden-variety life, liberty, and property interests are at stake. This has translated into skeletal proceedings in many non-fundamental settings. In *Goss v. Lopez*, for example, the Court ruled that minors are entitled to minimal process before being suspended for disciplinary reasons from public schools.²⁷¹ Judges are not required and the child need not be given a full-blown opportunity to challenge the reasons for

²⁶⁶ *Stanley*, 405 U.S. at 649 (emphasis added).

²⁶⁷ *Stanley v. Illinois*, 405 U.S. 645, 647 (1972).

²⁶⁸ *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 30 (1981) (observing that in complicated cases, like those relying on expert opinions, counsel might be demanded as a matter of due process, but holding that appointed counsel is not always necessary).

²⁶⁹ *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (holding that termination of parental rights must be supported by clear and convincing evidence).

²⁷⁰ *M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996) (holding that an indigent parent is entitled to free record in order to contest termination of parental rights) (quoting *Mayer v. Chicago*, 404 U.S. 189, 198 (1971)).

²⁷¹ *Goss v. Lopez*, 419 U.S. 565, 583–84 (1975) (holding that a minor can be suspended from school with minimal procedural protection).

suspension.²⁷² In *Ingraham v. Wright*, meanwhile, the Court held that children's constitutional liberty interests in being free from the infliction of appreciable physical pain by their teachers can be protected by post-deprivation relief.²⁷³ Children can thus be spanked in public schools without prior process.

It is safe to say, I think, that the more important the right, the more formal the process due. Because of their importance, familial rights and the general right to remain free from institutional restraint have generally received more procedural protection than non-fundamental interests, like attending public school²⁷⁴ or driving a car.²⁷⁵ Indeed, when "fundamental" rights—those that demand heightened substantive judicial scrutiny—are at stake, the Court has even occasionally required affirmative governmental assistance, like waiving fees²⁷⁶ and providing counsel.²⁷⁷ In contrast, it has not done so in non-fundamental contexts.²⁷⁸ The same goes for heightened evidentiary standards. Only when people (adults and children alike) are removed from their natural environments must the state explain its substantive decisions with something more than a preponderance of the evidence.²⁷⁹

This digression is not meant to imply that the procedural protections afforded the parent-child relationship must always exceed some minimal baseline established in non-fundamental settings. Indeed, interference with a parent's access to her children is sometimes judged by a less-suspicious standard. The law

²⁷² *Id.* at 584 (requiring only "an informal give-and-take between student and disciplinarian").

²⁷³ *Ingraham v. Wright*, 430 U.S. 651, 682 (1977) (holding that post-deprivation process is sufficient in context of corporal punishment in public schools).

²⁷⁴ *See, e.g., Goss*, 419 U.S. at 565 (holding that a student has a protected liberty interest in attending public school).

²⁷⁵ *See, e.g., Dixon v. Love*, 431 U.S. 105 (1977) (holding that a driver has a liberty interest in a license but that post-deprivation process is sufficient).

²⁷⁶ *See M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (holding that an indigent is entitled to a record of sufficient completeness to challenge termination of parental rights).

²⁷⁷ *See In re Gault*, 387 U.S. 1 (1967) (holding that a juvenile in delinquency proceeding is entitled to counsel); *Vitek v. Jones*, 445 U.S. 480, 500 (1980) (plurality) (holding that an indigent prisoner being transferred to a mental hospital is entitled to counsel, though not necessarily an attorney). *Cf. Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 30 (1981) (observing that in complicated cases, like those relying on expert opinions, counsel might be demanded in termination proceedings as a matter of due process, but holding that appointed counsel is not always necessary).

²⁷⁸ *See, e.g., United States v. Kras*, 409 U.S. 434, 450 (1973) (holding that the government need not waive civil filing fee for bankruptcy); *Ortwein v. Schwab*, 410 U.S. 656, 661 (1973) (holding there is no constitutional right to waiver of fees in civil litigation).

²⁷⁹ *See Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982) (holding that termination of parental rights must be supported by clear and convincing evidence); *Addington v. Texas*, 441 U.S. 418, 418 (1979) (holding that civil commitment of an adult must be supported by a minimum of clear and convincing evidence).

of arrest, for example, concedes nothing to familial rights. A child who has committed a crime can be seized in much the same way as an adult,²⁸⁰ which generally means without prior process.²⁸¹ Once seized, the Supreme Court made clear in *Schall v. Martin*²⁸² that a minor can be held for several days before receiving a hearing.²⁸³ The arrest and subsequent detention both interfere with parental care, custody, and control. Still, their impact on familial rights renders neither invalid.

The fundamental nature of familial rights, moreover, does not imply that prior judicial process is *always* required, or that parents enjoy a full complement of procedural protections *before* children are temporarily taken. All states agree that children can be rescued without prior judicial process when time is of the essence.²⁸⁴ And in *Newton v. Burgin*, the Supreme Court summarily ruled that ex parte judicial proceedings can be constitutionally used to rescue children from their homes.²⁸⁵ My point is that several holdings, including *Stanley*, *Lassiter*, *Santosky*, and *M.L.B.*, demonstrate that families are exceptional in the constitutional scheme of things. While familial rights are not absolute, they enjoy more constitutional protection than most other rights and interests. This does not mean states do not have a compelling interest in protecting children. Rather, it simply suggests that parental rights must be constitutionally accommodated.

B. Arrests, Searches, and Seizures

Although the Supreme Court has not expressly addressed the Fourth Amendment's application in the context of child rescues, lower courts tend to agree that the seizure of a child, whether from inside or outside the home, is a

²⁸⁰ See, e.g., *Hutchins v. D.C.*, 188 F.3d 531 (D.C. Cir. 1999) (assuming applicability of Fourth Amendment arrest standards in a case involving the arrest of a juvenile).

²⁸¹ See *infra* notes 315–319 and accompanying text.

²⁸² *Schall v. Martin*, 467 U.S. 253, 256 (1983) (holding that juvenile delinquents may be taken into preventive detention and be held for several days without a hearing).

²⁸³ The Supreme Court in *Gerstein v. Pugh*, 420 U.S. 103, 125–26 (1975), ruled that criminal suspects arrested without warrants are entitled to hearings within a matter of days following arrest. The Court in *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991), clarified *Gerstein*'s holding to mean that criminal suspects arrested without warrants should ordinarily receive hearings within forty-eight hours. Many lower courts today have squared *Schall* with *Gerstein* and *Riverside*, so that juvenile delinquents must also receive hearings within forty-eight hours. See, e.g., *Corder v. Rogerson*, 192 F.3d 1165, 1168 (8th Cir. 1999) (concluding that there is “no reason to believe” that the *Schall* and *Gerstein* standards are different).

²⁸⁴ See *supra* notes 22–38 and accompanying text.

²⁸⁵ *Newton v. Burgin*, 414 U.S. 1139 (1974), *aff'g* 363 F. Supp. 782 (W.D.N.C. 1973) (summarily affirming the lower court's conclusion that use of ex parte procedures to temporarily remove children from their homes did not violate constitutional guarantees).

Fourth Amendment problem.²⁸⁶ There is thus a unanimous conclusion that both the Fourth and Fourteenth Amendments apply to rescues and removals.

The Supreme Court, for its part, has concluded that arrests raise Fourth Amendment concerns for both adults and juveniles. In *California v. Hodari D.*, for example, the Court was careful to observe in the context of a juvenile's alleged arrest that the Fourth Amendment was "long understood" to protect against unreasonable seizures "*of the person*."²⁸⁷ Still, there is room to argue that the Fourth Amendment has limited (or no) application to the removal, as opposed to arrest, of a minor. The Supreme Court has observed on several occasions that minors, unlike adults, have no general right to "come and go at will."²⁸⁸ Children are always in someone's or something's custody. Like prisoners,²⁸⁹ the argument goes, children have less liberty than free adults. Removing a child is nothing more than shifting custody, which inside a prison has long been held to lack Fourth Amendment overtones.²⁹⁰

The argument, I think, proves too much. If true in the context of rescues and removals, then why not also true with children's arrests? If true for the Fourth Amendment, why not also true for the Due Process Clause, which has long been interpreted to protect children's procedural rights?²⁹¹ The Court has expressly stated in this latter context that "children have a protected liberty interest in 'freedom from institutional restraints,' even absent the stigma of being labeled 'delinquent' or 'mentally ill'."²⁹² The better approach, it seems, is to recognize that the Fourth Amendment applies to removals and rescues, just as it applies to

²⁸⁶ See, e.g., *Walsh v. Erie County Dep't of Job & Family Servs.*, 240 F. Supp. 2d 731, 747 n.3 (N.D. Ohio 2003) ("Just as . . . the Fourth Amendment restricts entries and inspections into private homes, it applies also to the removal of children by social workers."). These courts also agree that parents can assert the Fourth Amendment rights of their children. See, e.g., *Hollingsworth v. Hill*, 110 F.3d 733, 738 (10th Cir. 1997) ("Undoubtedly, parents may assert their children's Fourth Amendment rights *on behalf of* their children.").

²⁸⁷ *California v. Hodari D.*, 499 U.S. 621, 624 (1991) (emphasis added).

²⁸⁸ See *Reno v. Flores*, 507 U.S. 292, 302 (1993) (upholding an INS regulation allowing release of deportable children only to parents or guardians).

²⁸⁹ See *Hudson v. Palmer*, 468 U.S. 517, 526 (1984) (holding that an inmate has no Fourth Amendment expectation of privacy in his jail cell).

²⁹⁰ See, e.g., *Meachum v. Fano*, 427 U.S. 215, 216 (1976) (holding that an inmate can be transferred from medium to maximum security prison without process).

²⁹¹ See *supra* notes 282–83 and accompanying text.

²⁹² See *Reno v. Flores*, 507 U.S. 292, 317 (1993) (O'Connor, J., concurring) (citing *Breed v. Jones*, 421 U.S. 519 (1975) (holding that a juvenile delinquency proceeding is subject to due process) (citations omitted); *Parham v. J.R.*, 442 U.S. 584 (1979) (holding that a child is entitled to a hearing to test a parent's decision to commit the child to a mental health facility)). The court in *Walsh v. Erie County Dep't of Job & Family Servs.*, 240 F. Supp. 2d 731, 746–47 (N.D. Ohio 2003), perhaps put it best: "There is, the defendants' understanding and assertions to the contrary notwithstanding, no social worker exception to the strictures of the Fourth Amendment."

juvenile arrests. Children do not fall outside its terms, just as they do not forfeit the protections of the Fourteenth Amendment. Their rights may differ, but they exist nonetheless.

Another intriguing question is whether application of the Fourth Amendment ought to preclude procedural and substantive analyses under the Fourteenth Amendment's Due Process Clause.²⁹³ The Court has occasionally ruled that Fourth Amendment standards are exclusive. For instance, the Court concluded in *Graham v. Connor* that excessive force by a police officer during the course of an arrest is to be assessed *only* under the Fourth, and not the Fourteenth, Amendment.²⁹⁴ This ruling came after several years of experimentation by lower courts with both substantive and procedural due process.²⁹⁵ Despite the logical application of both clauses, the Court ultimately opted for the Fourth Amendment.²⁹⁶ A similar conclusion was reached in *Albright v. Oliver*, where the Court ruled that criminal suspects' procedural rights during the course of their

²⁹³ Of course, the Fourteenth Amendment would still have to be used to *incorporate* Fourth Amendment standards and apply them to the states. But this is quite different from using the Fourteenth Amendment's Due Process Clause to create substantive and procedural protections. See generally *Daniels v. Williams*, 474 U.S. 327, 337 (1986) (Stevens, J., concurring). Justice Stevens observes that the Due Process Clause encompasses

three different kinds of constitutional protection. First, it incorporates specific protections defined in the Bill of Rights. Thus, the State, as well as the Federal Government, must comply with the commands in the First and Eighth Amendments; so too, the State must respect the guarantees in the Fourth, Fifth, and Sixth Amendments. Second, it contains a substantive component, sometimes referred to as "substantive due process," which bars certain arbitrary government actions "regardless of the fairness of the procedures used to implement them." Third, it is a guarantee of fair procedure, sometimes referred to as "procedural due process": the State may not execute, imprison, or fine a defendant without giving him a fair trial, nor may it take property without providing appropriate procedural safeguards.

Id. (citations omitted).

²⁹⁴ *Graham v. Connor*, 490 U.S. 386, 388 (1989) (holding that excessive force claims against police officers are actionable only under the Fourth Amendment).

²⁹⁵ See *Brown*, *supra* note 46, at 821–25 (describing the history of procedural due process's use to federalize garden-variety torts). Note that where the Fourth Amendment does not apply, because, say, of the lack of a seizure, substantive due process can be applied. See *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (holding that a high speed chase by police was not a search or seizure under the Fourth Amendment and did not violate substantive due process). See generally MARK R. BROWN & KIT KINPORTS, *CONSTITUTIONAL LITIGATION UNDER § 1983* 58–61 (2003) (discussing the differences and similarities between the Fourth Amendment, substantive, and procedural due process). The ultimate question under substantive due process is whether the government's conduct "shocks the conscience" of the court. *Id.* at 59.

²⁹⁶ *Graham*, 490 U.S. at 388.

arrests are properly analyzed under the Fourth Amendment and not procedural due process.²⁹⁷

Due process, however, has been invoked too often in the context of juvenile rights to be discarded at this late juncture. In *Schall v. Martin*, for example, the Court analyzed the propriety of post-arrest juvenile detention under the Due Process Clause, as opposed to its Fourth Amendment counterpart.²⁹⁸ While the Court's due process analysis closely tracked the Fourth Amendment's application to adults,²⁹⁹ leaving open the possibility that the two provisions' treatment of adults and minors might eventually merge, this has not yet happened. Indeed, the Court continues to rely on the Due Process Clause in the context of juveniles' rights precisely because of its flexibility.³⁰⁰ It seems doubtful at this stage that the Court would be willing to eschew flexibility in favor of the more rigid requirements of the Fourth, Fifth, and Sixth Amendments.

Lower courts' near-unanimous conclusion that *both* the Fourth and Fourteenth Amendments apply to rescues accordingly seems sensible and correct. Any other course would require not only reworking existing precedent; it would also prove logically fragile under the Supreme Court's holding in *United States v. James Daniel Good Real Property*.³⁰¹ As described more fully below, the Court in *Good* ruled that both the Fourth and Fourteenth Amendments apply to forfeitures of real estate.³⁰²

This is not to say, however, that the requirements of both constitutional provisions are necessarily the same. Their respective histories, policies, and places in the constitutional scheme could lead to divergent results. The Second Circuit in *Tenenbaum*,³⁰³ for example, found overlap between the two Amendments in terms of timing,³⁰⁴ but also recognized potential differences in terms of probable

²⁹⁷ *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (holding that probable cause in the criminal setting is judged under the Fourth Amendment).

²⁹⁸ *Schall v. Martin*, 467 U.S. 253, 256–57 (1984) (holding that juvenile detainees are entitled to post-deprivation probable cause hearings).

²⁹⁹ *See Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (holding that suspects arrested without warrants are entitled to post-arrest probable cause determinations within a reasonable time).

³⁰⁰ *See e.g., Reno v. Flores*, 507 U.S. 292 (1993) (upholding detention of juvenile aliens under substantive and procedural due process).

³⁰¹ *United States v. James Daniel Good Real Property*, 510 U.S. 43, 46 (1993) (holding that summary seizure of real estate in the absence of exigent circumstances violates procedural due process).

³⁰² *Good*, 510 U.S. at 52. *See infra* notes 525–41 and accompanying text.

³⁰³ *Tenenbaum v. Williams*, 193 F.3d 581, 601 (2d Cir. 1999).

³⁰⁴ *Id.* at 605. Whatever differences might exist between Fourth and Fourteenth Amendment standards, the Second Circuit decided that dispensing with pre-deprivation judicial process is not among them. *Id.* (“Whatever Fourth Amendment analysis is employed, then, it results in a test for present purposes similar to the procedural due-process standard.”). Whether viewed through the Fourth or Fourteenth Amendments, according to the Second Circuit,

cause, the need for sworn affidavits, and the requisite neutrality of magistrates and judges.³⁰⁵ Logic does not dictate a lockstep approach. Fourth and Fourteenth standards can differ.

Consider, in particular, the peculiar problem of location under modern Fourth Amendment analysis. Homes historically have been afforded the utmost Fourth Amendment protection.³⁰⁶ Crossing the threshold of the home—whether to search for evidence or make an arrest—breaches fundamental notions of privacy. The Supreme Court has made clear that searches and arrests inside the home, absent exigent circumstances, must be accompanied by warrants.³⁰⁷ In contrast, searches³⁰⁸ and arrests³⁰⁹ outside the home generally need not be judicially authorized beforehand. Location is critical to the constitutional conclusion.

Procedural due process, however, weighs more than just the private interest at stake. According to *Mathews v. Eldridge*,³¹⁰ the state's administrative needs and, perhaps most importantly, the risk of erroneous decisions in the absence of prior process³¹¹ are also considered. The Fourth Amendment's focus is privacy. The Fourteenth's is certainty. While results under the Fourth and Fourteenth

"judicial authorization makes a fundamental contribution to the proper resolution of the tension among the interests of the child, the parents, and the State." *Id.* at 604. *See also* *Wallis v. Spencer*, 202 F.3d 1126, 1137 n.8 (9th Cir. 2000) ("[T]he same legal standard applies in evaluating Fourth and Fourteenth Amendment claims for the removal of children . . .").

³⁰⁵ *Tenenbaum*, 193 F.3d at 604.

³⁰⁶ *See* LAFAVE ET AL., *supra* note 18, at 138.

³⁰⁷ *See* *Payton v. New York*, 445 U.S. 573, 590 (1980) (holding that arrests inside the home ordinarily must be supported by either a warrant or exigent circumstances: "Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."); *Mincey v. Arizona*, 437 U.S. 385, 394 (1978) (holding that seriousness of offense by itself does not create exigent circumstances; rather, the question is whether circumstances would allow police time to seek a warrant). Assuming the owner consents to an officer's entry, of course, neither a warrant nor exigent circumstances are needed to make an arrest inside. *See* LAFAVE ET AL., *supra* note 18, at 194.

³⁰⁸ *See* LAFAVE ET AL., *supra* note 18, § 3.2.

³⁰⁹ *See* *United States v. Watson*, 423 U.S. 411, 431–32 (1976) (holding that felony arrests outside the home need not be supported by warrants).

³¹⁰ *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (holding that post-deprivation process in federal disability case is all that is constitutionally required).

³¹¹ The Court in *Mathews* stated that:

[f]irst [to be considered is] the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. *Mathews* is discussed more fully *infra* notes 516–41 and accompanying text.

Amendments may sometimes prove the same, competing policies and histories could direct separate outcomes. Lockstep logic should thus be avoided.

It would also be wrong, I believe, to assume any direct link between rescue and arrest within the confines of the Fourth Amendment. Granted, an analogy of this sort can be tempting. If children can be *arrested* outside the home without a warrant,³¹² why can they not be *rescued* outside the home without one? If they are protected inside the home from warrantless arrest,³¹³ why not afford them the same protection from rescue and removal?

Arrests and rescues should be addressed separately for several reasons. The first is historical. At common law, "a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable grounds for making the arrest."³¹⁴ According to the Supreme Court in *United States v. Watson*,³¹⁵ this was also "the prevailing rule under state constitutions and statutes" when the Fourth Amendment was adopted.³¹⁶ Because the Second Congress adopted this ancient standard in the late eighteenth century and "plainly decided against conditioning warrantless arrest power on proof of exigent circumstances,"³¹⁷ the Court in *Watson* assumed that the Framers of the Fourth Amendment could not have meant to displace it. The Court thus ruled that warrantless felony arrests are generally acceptable under the Fourth Amendment's exclusive terms, at least to the extent they occur outside the home.³¹⁸

³¹² See *United States v. Watson*, 423 U.S. 411, 431–32 (1976) (holding that felony arrest outside the home based solely on probable cause is proper).

³¹³ See *Payton v. New York*, 445 U.S. 573, 576 (1980) (holding that arrest inside the home must generally be accompanied by warrant).

³¹⁴ *United States v. Watson*, 423 U.S. 411, 438 (1976) (Marshall, J., dissenting) (citation omitted).

³¹⁵ *Id.* at 419 (holding that felony arrest outside the home is proper based solely on probable cause) (citation omitted).

³¹⁶ *Id.* at 419.

³¹⁷ *Id.* at 423.

³¹⁸ Left undecided by *Watson* was whether misdemeanors committed outside the presence of police could lead to warrantless arrests and whether warrantless arrests inside the home were valid absent exigent circumstances. Since *Watson*, some states have authorized warrantless arrests for at least some misdemeanors committed outside the presence of police. See, e.g., FLA. STAT. ch. 901.15(7) (2001) (authorizing warrantless arrest for crimes of domestic violence committed outside presence of police officer). The common law also recognized the validity of warrantless felony arrests inside the home. See *Payton v. New York*, 445 U.S. 573, 616 (1980) (White, J., dissenting) ("At common law, absent exigent circumstances, entries to arrest could be made only for felony."). The majority in *Payton*, however, refused to allow this same common law pedigree to displace the general Fourth Amendment warrant requirement. Searches inside the home for evidence, the majority noted, must be accompanied by warrants. "[A]n entry to arrest and an entry to search for and to seize property implicate the same interest in preserving the privacy and the sanctity of the home, and justify the same level of

Removal developed differently. By the time of the American Revolution, poor laws in England had modified fathers' near-perfect right to their children.³¹⁹ It was not unusual in England and colonial America for overseers and ministers to summarily remove and bind out poor children without parental consent.³²⁰ There were no procedural protections *at all* for poor parents. Similar practices continued well into the nineteenth century. By the latter part of that century, it had become common to "arrest" children for being poor and "delinquent."³²¹ Warrants were not required, whether the poor child was found inside or outside the home.

Children of wealth and privilege, however, were not subject to whimsical arrest and rescue at common law.³²² Because they were not poor, they were not considered delinquent.³²³ Child abuse laws did not exist and would not materialize for another hundred-plus years.³²⁴ Whether viewed through a late-eighteenth century or late-nineteenth century lens, there was simply no reason to rescue wealthy children from their parents.³²⁵ Unlike common law arrest, removal was a function of socio-economic status. Poor children were removed; rich children were protected.

This historical difference, I believe, partly explains why the constitutional law of rescue (and removal) can diverge from that surrounding arrest. History supports only the warrantless rescue/removal of *poor* children. Unless one is willing to breathe new life into the long-discredited notion that poverty, morality, and criminality are directly correlated, it is difficult to uncover meaningful historical support for summary rescues.

Abuse, moreover, was not even a justification for rescue until the late nineteenth century.³²⁶ Until 1874, states employed crime-control models to deal with "delinquents." Juveniles were removed because they were poor, immoral, and likely to become criminals. States had no interest in "abused" children. "Social workers" and social welfare systems, as they are known today, simply did not exist.³²⁷ There thus is scant historical support for rescuing abused children

constitutional protection." *Id.* at 588. Consistency, the majority found, required extending the warrant requirement to arrests as well as searches inside the home. *Id.*

³¹⁹ See *supra* notes 179–87 and accompanying text.

³²⁰ See *supra* notes 223–24 and accompanying text.

³²¹ See *supra* notes 234–37 and accompanying text.

³²² See *supra* notes 179–81 and accompanying text.

³²³ See *supra* notes 198–203 and accompanying text.

³²⁴ See *supra* notes 204–22 and accompanying text.

³²⁵ See *supra* notes 179–204 and accompanying text.

³²⁶ See *supra* notes 194–97 and accompanying text.

³²⁷ See *Hoffman v. Harris*, 511 U.S. 1060, 1062 (1994) (Scalia & Thomas, J.J., dissenting from denial of certiorari). Justice Thomas observed in his dissent from the Court's denial of certiorari that:

from abusive parents.³²⁸ Rescuing abused children is certainly a worthy and wise development, but it is of recent vintage under American law.

Second, modern-day *delinquents*—who are subject to arrest³²⁹—differ from *dependents*—who are not. In order to engage in criminal acts and other forms of anti-social behavior, delinquents necessarily will have matured beyond tender years. Tots and toddlers simply cannot commit crimes or engage in other acts that would cause them to be considered delinquent. While young children are rarely subject to arrest, they are often the focus of abuse complaints.³³⁰ Patterning dependency procedures on delinquency procedures would subject a significantly larger number of children to summary seizure.

Third, as an adjunct to criminal law, delinquency is largely defined—and limited—by the requirements of free will. These requirements, often understood

The courts that have accorded absolute immunity to social workers appear to have overlooked the necessary historical inquiry; none has seriously considered whether social workers enjoyed absolute immunity for their official duties in 1871. If they did not, absolute immunity is unavailable to social workers under § 1983. This all assumes, of course, that “social workers” (at least as we now understand the term) even existed in 1871.

Id. (citations omitted).

³²⁸ If anything, the historical record teaches that states’ asserted *parens patriae* interests in children must be carefully considered. For generations, states claimed a *parens patriae* interest in removing poor children from their homes. Other than being institutionalized or sold into what was the equivalent of slavery, most of these children were not “protected” in any way. What the Court said in *In re Gault*, 387 U.S. 1, 10 (1976)—“Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure”—holds as true for America’s treatment of dependent children as it does for delinquent children. Benevolent theories do not always translate into beneficent results. *Id.* Worse yet, the underlying theory itself may be flawed, as was certainly the case in the context of eighteenth- and nineteenth-century poor laws.

³²⁹ Because states in the eighteenth and nineteenth centuries equated delinquency with crime, children were commonly taken from their homes without warrants. This continued into the first half of the twentieth century, even as states’ concerns began to shift toward child safety. Children were simply not afforded many (if any) constitutional rights. This changed somewhat with the Supreme Court’s decision in *In re Gault*, 387 U.S. 1, 1–2 (1967) (holding that juvenile delinquents are entitled to the protections of the Due Process Clause). Following *Gault*, children could be arrested and detained outside the home without warrants (consistent with *Watson* and *Payton*). See, e.g., *Schall v. Martin*, 467 U.S. 253, 253 (1984) (holding that a juvenile may be detained when an adult could be detained under similar circumstances). Many states began to impose court order requirements in dependency situations. See, e.g., MODEL ACT OF 1968 (discussed *supra* notes 249–55 and accompanying text). Delinquency and dependency properly began to diverge at this juncture in American history.

³³⁰ *Id.* at 13. One of the Doe children, for example, was six years old. See *supra* notes 99–100 and accompanying text. The child removed in *Tenenbaum* was five. *Tenenbaum v. Williams*, 193 F.3d 581, 588 (2d Cir. 1999). The children removed in *Wallis* were two and five. *Wallis v. Spencer*, 202 F.3d 1126, 1131 (9th Cir. 2000).

as voluntary conduct coupled with mens rea (scienter),³³¹ result in not only a smaller universe of potential delinquents, they also reduce the risk of erroneous decisions. The outward expressions of free will demanded by delinquency laws reduce the risk of erroneous arrests.³³²

Dependency laws, in contrast, uniformly rely on ambiguous criteria, like "abuse" and "neglect," without providing true guidance to social workers and welfare agencies. Howard Davidson, director of the American Bar Association's Center on Children and the Law, has lamented that "[a] single incident of a child seemingly left unattended by parental or adult supervision, or where, in an instant, a parent has 'lost their cool' and hit their child, are frequent bases for making reports that cause full-scale . . . investigations."³³³ "By far," Davidson has noted, "the majority of reports of child maltreatment do not allege that children are in serious and imminent danger . . ."³³⁴ Thus, "it is time to seriously consider changes in the fundamental ways in which child abuse and neglect are defined and responded to."³³⁵

This theme is echoed by Professor Harold Richman, who serves as the Director of the Chapin Hall Center for Children at the University of Chicago. Professor Richman has offered that the basic definition of child abuse has "greatly expanded" in the years following the American Academy of Pediatrics' first conference on battered children.³³⁶ "There are four major types of child maltreatment," according to Professor Richman: "physical abuse, sexual abuse, emotional maltreatment, and neglect."³³⁷ "Neglect is far and away the most common form of child maltreatment and, of course, it is a particularly difficult state to define in absolute terms. If we combine this with emotional maltreatment, another slippery slope, we account for almost 60% of all maltreatment."³³⁸ Emotional maltreatment, in particular, is a "difficult concept to capture."³³⁹ Dr. Richman found that most reported child abuse cases fall into a "troublesome" gray area, one that has caused "a long and continuing struggle to differentiate

³³¹ See generally WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 193 (2d ed. 1986).

³³² See *id.* at 197 ("One [reason] is that a person's thoughts are not susceptible of proof except when demonstrated by outward actions.").

³³³ Davidson, *supra* note 13, at 774.

³³⁴ Davidson, *supra* note 13, at 774.

³³⁵ Davidson, *supra* note 13, at 774.

³³⁶ Richman, *supra* note 65, at 221.

³³⁷ Richman, *supra* note 65, at 221.

³³⁸ Richman, *supra* note 65, at 221.

³³⁹ Richman, *supra* note 65, at 221.

between willful neglect . . . and the consequences of involuntary poverty and deprivation”³⁴⁰

As demonstrated by Florida’s experiment,³⁴¹ mandatory reporting laws—which “frequently started with emergency-room physicians, expanded to include all physicians and nurses, and went on to include teachers, social workers, and others who work with children”³⁴²—have compounded the problem. “What’s more, if these professionals failed to report any such case, they faced criminal penalties. This greatly increased the bias toward reporting. Reporting was the default: report and you’re covered, even if you’re wrong—never mind the costs, both to the state and to the families wrongly accused.”³⁴³ Toll-free reporting numbers “made reporting, well founded or not, appear to be not only the right thing to do, but also easy.”³⁴⁴ Ambiguity and volume thus conspire to inflate the risk of erroneous rescues and removals in the child welfare system. Delinquency, in contrast, is better defined and more clearly manifested. While juvenile arrests are sometimes wrong, their likelihood of error would appear significantly smaller than the risk of needlessly rescuing children from capable parents.

Moreover, law enforcement personnel, who are generally charged with enforcing delinquency laws, are better-trained than the social workers who administer child welfare systems. “In most states, a bachelor’s degree in any subject is all that is required to become a public child protective service (CPS) caseworker. After hiring, CPS pre-service training is too often minimal. Pay scales are often very low, morale is frequently poor, and staff turnover is

³⁴⁰ Richman, *supra* note 65, at 221. Even with physical and sexual abuse, which make up less than a third of the country’s abuse cases, tremendous problems arise. *Id.* When does parental action “cross[] from discipline to abuse”? *Id.* “The problem increased when sexual abuse was added to the equation. When physical evidence of sexual abuse was absent or ambiguous, could we know what had happened? . . . Was it true that children never lied and were never suggestible about such matters, or not?” *Id.* “[W]hen we move beyond evident, serious physical injury, matters are less clear.” *Id.* at 222.

³⁴¹ See *supra* notes 49–92 and accompanying text.

³⁴² Richman, *supra* note 65, at 222.

³⁴³ Richman, *supra* note 65, at 222. See also Chill, *supra* note 39, at 542 (reporting that social workers, too, pursue removals in order to avoid discipline and criminal liability).

³⁴⁴ Richman, *supra* note 65, at 222. As a consequence, the number of child abuse reports expanded from 60,000 in 1974 to over three million in 1997. *Id.* at 223. Professor Richman blames this increase not only on ambiguous definitions, but also on sensational media coverage and a steady increase in poverty. *Id.* Regardless of the precise causes, it appears that social workers in many states today—like Florida—have almost as much discretion to remove children as the churchwardens, overseers, and protection societies of generations past. Professor Richman offers that a “substantial part [of the number of false accusations] surely comes from the vague and inclusive definitions we operate under and the bias toward reporting we have created.” *Id.* See also Chill, *supra* note 39, at 541 (reporting that one-third of all rescued children in America are not abused).

constant.”³⁴⁵ This certainly has proven true in Florida, where turnover rates have remained high for years.³⁴⁶ Howard Davidson thus urges “much greater legislative attention and funding . . . to upgrade the CPS workforce.”³⁴⁷ Inadequate training and frequent turnover only exacerbate the welfare system’s risk of error.

For all these reasons, rescue is more of a gamble than might initially appear. While I am not aware of data that proves or disproves this proposition, it appears reasonable to believe that the likelihood of erroneous rescue is larger than the likelihood of erroneous arrest. The modern child welfare system lacks the indicia of reliability attached to criminal law enforcement. Unlike police forces, caseworker turnover is constant. Training is minimal and morale low. Caseworkers are routinely expected to apply vague standards to ambiguous facts. In light of the uncertainty that is naturally attached to these problems, one could easily conclude that greater procedural protections are needed. Post-deprivation review may suffice for arrest, but not for rescue and removal.³⁴⁸

C. Civil Commitment

The Supreme Court has ruled, as a substantive matter, that adults can be involuntarily committed when they are dangerous to themselves or others.³⁴⁹ The Court has also held that civil commitment results in a deprivation of “liberty”³⁵⁰

³⁴⁵ Davidson, *supra* note 13, at 772.

³⁴⁶ See *supra* notes 69–72 and accompanying text.

³⁴⁷ Davidson, *supra* note 13, at 773 (“all caseworkers should be legally required to attend a pre-service academy similar to the intensive professional skills education that police, firefighter, and emergency medical technician trainees typically receive”).

³⁴⁸ Immediate detention not only acts as punishment for the wrongdoer; it offers protection for society. Just as juveniles who outwardly exhibit anti-social traits are in need of correction, society needs to be protected from future wrongs. Immediate detention efficiently serves both ends. Dependent children, in contrast, need no correction. Nor does society need to be protected from them. Immediate removal serves neither of these goals. Instead, removal is *designed to protect dependent children* from their parents. Because dependency’s objective is strikingly different, it is not illogical to employ different means to achieve its goal. As demonstrated below, immediate removal can harm children as much as it helps them. It is thus not an efficient way of protecting children.

³⁴⁹ See *O’Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (holding that civil commitment must be predicated on a finding of future dangerousness).

³⁵⁰ See *Humphrey v. Cady*, 405 U.S. 504, 509 (1972) (observing that civil commitment is a “massive curtailment of liberty”); *Addington v. Texas*, 441 U.S. 418, 425 (1979) (concluding that civil commitment is subject to due process constraints); *Vitek v. Jones*, 445 U.S. 480, 493–94 (1980) (concluding that involuntary commitment of an inmate implicated procedural due process).

for purposes of procedural due process.³⁵¹ The Court has yet to define, however, the precise procedures for temporary, involuntary civil commitment. Must warrants generally be obtained in the absence of exigent circumstances? Can adults (or children) be temporally committed based solely on probable cause?

Civil commitment's history differs from that of rescue and removal. Blackstone, of course, recognized that poor children could be removed from their homes and impressed into the service of others.³⁵² Substantive and procedural protections for the poor were unheard of in colonial America.³⁵³ In contrast, "[t]he common law had little need to concern itself with questions of adequate procedure for involuntary confinement because public institutions for the mentally ill were virtually nonexistent."³⁵⁴ The first mental hospital in America was not founded until 1751, and even one hundred years later, few mental institutions existed.³⁵⁵ It was not until 1788 that New York passed a law that authorized the involuntary commitment of those "furiously madd [sic],"³⁵⁶ and then—consistent with the caution of the day—only upon the issuance of a warrant.³⁵⁷

By the middle of the nineteenth century, these strict procedural and substantive standards for involuntary commitment began to change. More relaxed standards allowed "dangerous" persons to be restrained indefinitely.³⁵⁸ Until the latter half of the twentieth century, involuntary civil commitment was informal, with little judicial oversight and protection.³⁵⁹ It was not until the late-1960s that civil commitment began shifting back to a more structured model.

The impetus for this shift appears to have been *In re Gault*,³⁶⁰ which extended basic due process protections to juvenile delinquency proceedings in 1967.³⁶¹ If civil delinquency proceedings are controlled by due process, courts

³⁵¹ FRED COHEN, THE LAW OF DEPRIVATION OF LIBERTY: CASES AND MATERIALS 339 (1991) ("Civil commitment *per se* is so obviously a loss of liberty in its most pristine form that there can be no question about the applicability of procedural due process . . .").

³⁵² See *supra* notes 179–86 and accompanying text.

³⁵³ See *supra* note 187 and accompanying text.

³⁵⁴ *Lessard v. Schmidt*, 349 F. Supp. 1078, 1084 (E.D. Wis. 1972) (citing 1 BLACKSTONE, COMMENTARIES 305 (Christian ed. 1827)), *vacated*, 414 U.S. 473 (1974).

³⁵⁵ *Lessard*, 349 F. Supp. at 1084–85.

³⁵⁶ *Id.* at 1085.

³⁵⁷ *Id.* (citing 1788 N.Y. Laws ch. 31).

³⁵⁸ See, e.g., *In re Josiah Oakes*, 8 Law Rep. 123 (Mass. 1845), available at <http://www.disabilitymuseum.org/lib/docs/1305.htm> (concluding that the detention of a man who became engaged to a younger woman shortly following the death of his wife was proper).

³⁵⁹ *Lessard*, 349 F. Supp. at 1085–86.

³⁶⁰ *In re Gault*, 387 U.S. 1, 30–31 (1967) (holding that juvenile delinquents are entitled to protections of the Due Process Clause).

³⁶¹ See *supra* notes 241–48 and accompanying text.

began to ask, then why not civil commitment?³⁶² By the mid-1970s, when the Supreme Court began developing substantive standards for commitment,³⁶³ it became clear that the Constitution's procedural protections must in some way prove relevant.³⁶⁴ In *Lessard v. Schmidt*,³⁶⁵ for example, a three-judge federal district court ruled in 1972 that while summary commitments are constitutionally proper in emergencies, prompt post-deprivation process is required.³⁶⁶ *Lessard* did not go so far as to hold that judicial authorization is generally required before civil commitment. Its holding, however, reflects an important attitudinal change among federal judges. No longer would governmental officials have carte blanche to commit adults.

Notwithstanding this shift to more formal process, civil commitment still continued to trail criminal detention in terms of procedural protections. In *Project Release v. Prevost*,³⁶⁷ for example, which upheld a New York commitment procedure that diverged sharply from the arrest and detention standards spelled out in *Gerstein v. Pugh*,³⁶⁸ the Second Circuit rejected any "notion . . . that civil commitment is tantamount to incarceration for criminal conduct."³⁶⁹

Although civil commitment and criminal arrest have remained constitutionally distinct throughout most of our Nation's history, their procedural differences were recently blurred by the Supreme Court's 1989 decision in *Zinermon v. Burch*.³⁷⁰ *Zinermon* was a § 1983 action on behalf of a plaintiff (Burch) who ostensibly voluntarily signed himself into a mental health facility in

³⁶² See, e.g., *Lessard v. Schmidt*, 349 F. Supp. 1078, 1086 (E.D. Wis. 1972); see also *Doe v. Gallinot*, 486 F. Supp. 983, 994 (C.D. Cal. 1979) (holding that a probable cause hearing must be held within seven days of commitment); *Wessel v. Pryor*, 461 F. Supp. 1144, 1147 (E.D. Ark. 1978) (requiring that a probable cause determination be made within seventy-two hours); *Kendell v. True*, 391 F. Supp. 413, 419 (W.D. Ky. 1975) (requiring a probable cause hearing for commitment).

³⁶³ In *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975), for example, the Court ruled that commitment must be predicated on future dangerousness.

³⁶⁴ In *Addington v. Texas*, 441 U.S. 418, 425 (1979), the Court ruled that clear and convincing evidence is required for involuntary commitment.

³⁶⁵ *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), vacated, 414 U.S. 473 (1974).

³⁶⁶ *Id.* at 1093 (en banc). The Wisconsin law at issue in *Lessard* authorized post-deprivation delays totaling 145 days and thus was declared unconstitutional. *Id.*

³⁶⁷ *Project Release v. Prevost*, 722 F.2d 960, 973-74 (2d Cir. 1983) (holding that civilly committed individuals are not entitled to same protections as arrested criminal suspects).

³⁶⁸ *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (holding that those arrested without warrants are subject to prompt post-arrest judicial review).

³⁶⁹ *Project Release*, 772 F.2d at 974.

³⁷⁰ *Zinermon v. Burch*, 494 U.S. 113, 135 (1989) (holding that civil commitment is not a "random and unauthorized" act dispensing with need for pre-deprivation process).

Florida,³⁷¹ where he was to be confined for five months. Because he was clearly incompetent and was not provided a hearing to assess either his competency or his potential dangerousness, Burch claimed that his commitment violated procedural due process.³⁷²

The defense responded that if Burch's claims were true, hospital staff members violated Florida law by summarily admitting him.³⁷³ Because their actions were thus "random and unauthorized" within the meaning of *Parratt v. Taylor*³⁷⁴ and *Hudson v. Palmer*,³⁷⁵ they could not have been preceded by process. Burch's ability to pursue tort remedies against the offending parties, they claimed, satisfied the demands of *Parratt*, *Hudson*, and procedural due process.³⁷⁶ The Supreme Court disagreed. It found that prior process was possible in Burch's case even if state law had been violated.³⁷⁷ Prior process, moreover, was potentially valuable—that is, it may have prevented Burch's commitment.³⁷⁸ Burch's post-commitment tort remedies thus did not relieve the defendants of their general responsibilities under the Due Process Clause.

At first blush, *Zinermon* appears to strike a powerful blow in favor of the argument for pre-commitment judicial process. The Court's result, however, is easily overstated. The narrow issue presented in *Zinermon* was whether the *Parratt-Hudson* exception defeated Burch's procedural due process claim.³⁷⁹ The

³⁷¹ Burch signed himself into Apalachee Community Mental Health Services (ACMHS), a private facility. The Eleventh Circuit in *Zinermon* assumed that the private hospital was a state actor acting under color of law. See *Burch v. Appalachee Community Mental Health Servs., Inc.*, 840 F.2d 797, 803 (11th Cir. 1988). The Supreme Court did not address this particular issue. The Eleventh Circuit has since ruled that private mental health facilities, though heavily regulated and authorized to commit mental patients by state law, are not state actors subject to suit under 42 U.S.C. § 1983. *Harvey v. Harvey*, 949 F.2d 1127, 1131–32 (11th Cir. 1992). See also *Ellison v. Garbarino*, 48 F.3d 192, 196–97 (6th Cir. 1995) (concluding that a private mental health facility was not a state actor when it committed a patient).

³⁷² *Zinermon*, 494 U.S. at 115.

³⁷³ Burch apparently conceded this point. See *id.* at 117 n.3.

³⁷⁴ *Parratt v. Taylor*, 451 U.S. 527, 543 (1980) (holding that "random and unauthorized" acts need not be preceded by prior process in order to satisfy procedural due process).

³⁷⁵ *Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (holding that even intentional wrongs can be "random and unauthorized" for purposes of *Parratt*).

³⁷⁶ Under the *Parratt-Hudson* doctrine, random and unauthorized deprivations need not be preceded by prior process; post-deprivation process, such as a false imprisonment claim, satisfies due process. See *Brown*, *supra* note 46, at 825–29. The Court in *Zinermon* extended the *Parratt-Hudson* exception, which previously had been applied only to property interests, to liberty. *Zinermon v. Burch*, 494 U.S. 113, 132 (1989).

³⁷⁷ *Zinermon*, 494 U.S. at 138–39.

³⁷⁸ *Id.* at 134.

³⁷⁹ *Id.* at 117.

[T]he question before us is a narrow one. We decide only whether the *Parratt* rule necessarily means that Burch's complaint fails to allege any deprivation of due process,

Court categorically refused to address “[t]he broader questions of what procedural safeguards the Due Process Clause requires in the context of an admission to a mental hospital”³⁸⁰ The Court in *Zinermon* thus did not decide whether civil commitment is generally premised on prior judicial process. It simply ruled that one obstacle to Burch’s civil rights claim—the *Parratt-Hudson* exception—had been overcome.³⁸¹ The Court left open the possibility that other policies might justify postponing process.

Still, while it does not resolve the ultimate issue of whether prior process is required, *Zinermon*’s analysis suggests an answer. *Parratt*, the Court observed, is a particular application of the *Mathews v. Eldridge*³⁸² three-part balancing test.³⁸³ This test weighs the nature of the private right at stake, the government’s interest and (perhaps most importantly) the value of prior process in order to determine whether hearings should be conducted before deprivations.³⁸⁴ Turning to this last concern, the Court in *Zinermon* concluded that prior process was not only feasible, it was *valuable*.³⁸⁵ The Court lauded Florida’s involuntary placement process, which required prior judicial process in the absence of emergencies.³⁸⁶ The logical suggestion is that no less should be expected when commitment is premised on voluntary consent.

It is not my intent to parse the precise meaning of the Court’s holding in *Zinermon*. My interest lies in the Supreme Court’s conclusion that prior process can be valuable in the commitment context. If it helps avoid improper commitment, should not prior process be invoked whenever feasible? Of course, this approach has been rejected under the law of arrest, which (with the Fourth Amendment’s blessing) allows warrantless arrests outside the home.³⁸⁷ Were courts to read *Zinermon* to demand prior judicial process whenever feasible, temporary civil commitment would prove more constitutionally constrained than criminal arrest.

because he was constitutionally entitled to nothing more than what he received—an opportunity to sue . . . in tort for his allegedly unlawful confinement.

Id.

³⁸⁰ *Id.*

³⁸¹ *Id.* at 138–39.

³⁸² *Mathews v. Eldridge*, 424 U.S. 319, 343 (1976) (holding that termination of disability benefits need not be preceded by process).

³⁸³ *Zinermon v. Burch*, 494 U.S. 113, 129 (1989).

³⁸⁴ *Id.* at 127 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

³⁸⁵ *Id.* at 135.

³⁸⁶ *Id.* at 133–34.

³⁸⁷ See *supra* notes 306–10 and accompanying text.

Lower courts have not embraced such a bold interpretation of *Zinerman*.³⁸⁸ Instead, lower courts commonly approve summary, temporary commitments—whether inside or outside the home. Civil commitment thus remains less formal than criminal arrest, *Zinerman* notwithstanding.

Why has *Zinerman* not had a larger impact? Why have the lower courts not demanded court orders for temporary civil commitments? Part of the reason, it seems, is that commitment is typically initiated under facts that closely approach exigent circumstances.³⁸⁹ Involuntary commitment, after all, is constitutionally predicated on “dangerousness,”³⁹⁰ which lies in close proximity to the emergency rationale that excuses the need for warrants under the Fourth Amendment³⁹¹ and prior judicial process under the Due Process Clause.³⁹² Lower courts often conclude that summary commitments are justified by exigent circumstances, thus dispensing with any need to discuss whether warrants or court orders should have been sought beforehand.

Katzman v. Khan offers an example.³⁹³ There, a young man who was discovered running wildly and menacingly through a building was immediately taken into custody under New York’s civil commitment statute.³⁹⁴ The court had little difficulty concluding that his summary, warrantless seizure did not violate

³⁸⁸ See JOHN PARRY & F. PHILLIPS GILLIAM, HANDBOOK ON MENTAL DISABILITY LAW 174 (2002) (“Emergency commitments usually are based on . . . probable cause that, without inpatient mental health treatment, proposed patients will pose a serious risk of immediate harm to themselves or others.”).

³⁸⁹ *Id.*

³⁹⁰ See *O’Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (holding that one may be committed only if dangerous to himself or others).

³⁹¹ For example, in *McCabe v. Life-Line Ambulance Serv.*, 77 F.3d 540, 546 (1st Cir. 1996) (discussed more fully *infra* notes 398–402 and accompanying text), police argued that every involuntary commitment falls under the exigent circumstances exception. Commitment, they argued, can only be justified by a “medical finding that the subject presently poses a ‘likelihood of serious harm’ to herself or others, which in turn provides the police with reasonable cause to believe that an immediate, forcible” commitment is needed. *McCabe*, 77 F.3d at 546.

³⁹² The *Zinerman* majority appeared to recognize that emergency circumstances can also excuse prior process under the Due Process Clause. *Zinerman v. Burch*, 494 U.S. 113, 122 (1989) (describing Florida’s involuntary commitment procedure which it later used as a model for voluntary commitment). Lower courts have uniformly agreed that exigent circumstances excuse any need for prior process. See, e.g., *Roska v. Peterson*, 328 F.3d 1230, 1242 (10th Cir. 2003) (holding that lack of exigent circumstances in context of warrantless rescue from child’s home results in Fourteenth Amendment violation).

³⁹³ *Katzman v. Khan*, 67 F. Supp. 2d 103 (E.D.N.Y. 1999), *aff’d*, 242 F.3d 365 (2d Cir. 2000).

³⁹⁴ *Id.* at 107.

the Fourth or Fourteenth Amendments. Exigent circumstances clearly existed, and the seizure was consequently valid under any constitutional standard.³⁹⁵

Katzman illustrates the reality of civil commitment. Quite often, true exigent circumstances exist regardless of whether commitment originates inside or outside the home. This is due, in part, to the substantive constitutional predicate for commitment; a person must be an immediate danger to himself or others.³⁹⁶ Unlike child abuse laws, which include past harm as well as risks of future harm, the civil commitment process is largely tied to the future. Facts that satisfy this predictive standard often satisfy the exigent circumstances exception, which similarly focuses on what might happen in the future. Quite distinct from child abuse investigations, the civil commitment process rarely affords government officials time to seek prior judicial authorization.³⁹⁷

In those rare cases where exigent circumstances do not plausibly exist, lower courts have tended to fashion exceptions tailored specifically to civil commitment. For instance, in *McCabe v. Life-Line Ambulance Service*, police summarily broke down the door of a home occupied by a disoriented, elderly woman (Zinger) in order to commit her.³⁹⁸ During the course of the police raid, which the district court found had proceeded "with leisure,"³⁹⁹ Zinger died of cardiac arrest.⁴⁰⁰ Her estate claimed that, because sufficient time existed to seek prior judicial authorization, the police violated Zinger's Fourth Amendment rights.⁴⁰¹ The First Circuit, applying the Fourth Amendment's "special needs" doctrine, concluded that in the context of civil commitment police can forcibly enter homes without warrants.⁴⁰² Specific exigent circumstances are not required.

The seizure in *McCabe*, of course, occurred inside the home. Because a criminal arrest under similar circumstances would have violated the Fourth

³⁹⁵ *Id.* at 109–10.

³⁹⁶ See *supra* notes 349–50 and accompanying text.

³⁹⁷ For instance, in *Rodriguez v. City of New York*, 72 F.3d 1051, 1062 (2d Cir. 1995), the Second Circuit read New York law to allow summary commitment

only if a staff physician of the hospital upon examination of such person finds that such person [has] a mental illness for which immediate observation, care, and treatment in a hospital is appropriate . . . that the patient's alleged mental illness be 'likely to result in serious harm to himself or others. . . . '[I]likely to result in serious harm to himself,' as used in [New York law], means posing a [substantial risk of physical harm to himself as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that he is dangerous to himself.]

Given this narrow interpretation, New York's law, which authorizes warrantless removals from the home, was found to satisfy due process. *Id.*

³⁹⁸ *McCabe v. Life-Line Ambulance Serv.*, 77 F.3d 540 (1st Cir. 1996).

³⁹⁹ *Id.* at 543 (emphasis omitted).

⁴⁰⁰ *Id.* at 542.

⁴⁰¹ *Id.* at 543 (emphasis omitted).

⁴⁰² *Id.* at 544–45.

Amendment, the First Circuit was forced—assuming the Fourth Amendment’s relevance⁴⁰³—to look for an exception. Seizures and arrests outside the home, however, do not require warrants under the Fourth Amendment.⁴⁰⁴ Under these circumstances, courts have often employed Fourth Amendment arrest standards to uphold summary civil commitments. *Villanova v. Abrams* provides perhaps the best example.⁴⁰⁵ There, Judge Posner analyzed civil commitment in “straightforward” Fourth Amendment terms:

A civil commitment is a seizure, and may be made only upon probable cause, that is, only if there are reasonable grounds for believing that the person seized is subject to seizure There is no requirement of a warrant issued by a judicial officer. . . . [A]n arrest warrant is required only when a person is to be arrested in his home.⁴⁰⁶

In sum, lower courts have tended to sustain summary commitments under any and all circumstances. Where seizure takes place outside the home, they often analogize to the law of criminal arrest. When commitment occurs inside the home, courts either find exigent circumstances or create a “special needs” exception. The “most litigated” question in the context of commitment, consequently, is not whether a hearing should have been held beforehand, but how long the institutionalized patient must wait before a hearing is held.⁴⁰⁷

I find it surprising that *Zinermon*’s due process discussion has not had a greater impact on civil commitment. *Zinermon*, after all, was premised on what the Court perceived to be a general availability of pre-commitment procedures. Unless *Zinermon* was intended to cover only “long-term” as opposed to “temporary” commitments—a plausible but (it seems to me) ultimately flawed interpretation⁴⁰⁸—its language and holding would certainly seem relevant. Indeed, *Zinermon* offers a good argument for generally demanding pre-commitment process when feasible.

⁴⁰³ Courts today tend to agree that the Fourth Amendment is relevant to civil removals and commitments, as well as criminal arrests. *See, e.g., McCabe*, 77 F.3d at 545. *See also supra* notes 286–92 and accompanying text (describing application of both Fourth and Fourteenth Amendments to rescues of children).

⁴⁰⁴ *See supra* notes 306–09 and accompanying text.

⁴⁰⁵ *Villanova v. Abrams*, 972 F.2d 792 (7th Cir. 1992).

⁴⁰⁶ *Id.* at 795.

⁴⁰⁷ *PARRY & GILLIAM, supra* note 388, at 175.

⁴⁰⁸ A full exposé on the meaning of *Zinermon* is beyond the scope of this Article. For an excellent discussion of *Zinermon*, the reader is encouraged to peruse Laura Oren, *Signing into Heaven: Zinermon v. Burch, Federal Rights, and State Remedies Thirty Years After Monroe v. Pape*, 40 EMORY L.J. 1 (1991).

Even conceding that adults can be committed without prior process,⁴⁰⁹ this should not be understood to mean that children can be summarily removed from their homes and families. Children are different. The policies that justify the immediate commitment of adults do not necessarily apply to the rescue of children. First, adults—even those suspected of mental illness—are generally better able to care for themselves than are children. Many mentally disabled adults can exist without caregivers and other forms of paternal/maternal assistance. Children, especially those of tender years, need care and almost-constant companionship. The removal of a child from his natural environment can be far more damaging than the commitment or arrest of an adult.

Second, one should not forget the impact rescue has on parents. A common assumption is that suspected abusers “get what they deserve.” Who cares if these parents suffer late-night knocks on their doors from unknown social workers who intend to snatch their children? This attitude reflects an unfortunate rush to judgment. As made clear below, many suspected parents are perfectly innocent.⁴¹⁰ The pain inflicted on innocent parents when children are wrongly removed greatly exceeds the harm caused by wrongful arrests and commitments of adults.⁴¹¹

Third, as discussed in detail below, modern definitions of child abuse tend to be fluffy and vague.⁴¹² Unlike criminal statutes, abuse laws are not written succinctly. And unlike the Supreme Court’s singular standard for civil commitment—“dangerous to himself or others”⁴¹³—abuse laws target a wide array of “bad parenting.”⁴¹⁴ It is no exaggeration to say that abuse laws are generally open to interpretation. Coupled with political pressures fed by horrendous headlines and a natural desire to protect children,⁴¹⁵ the child abuse system’s net can be cast far and wide.

Fourth, unlike civil commitment, removal carries with it a large measure of moral approbation. The message to parents—“you’ve done something terribly wrong”—is often broadcast to the community. When someone is committed, by contrast, the communal reaction tends to be one of concern, not outrage.

For all these reasons, the rules surrounding civil commitment should not be borrowed wholesale for the law of rescue and removal. Abuse is different.

⁴⁰⁹ See PARRY & GILLAM, *supra* note 388.

⁴¹⁰ See *infra* notes 500–04 and accompanying text.

⁴¹¹ See *infra* notes 500–05 and accompanying text.

⁴¹² See *supra* notes 333–40 and accompanying text.

⁴¹³ O’Connor v. Donaldson, 422 U.S. 563 (1975).

⁴¹⁴ See *supra* notes 333–40 and accompanying text.

⁴¹⁵ See Chill, *supra* note 39, at 542 (“Defensive social work has flourished in the past 20 years, fueled by the news media’s appetite for sensational child maltreatment stories as well as by laws that purposely magnify the public visibility of child maltreatment fatalities and near fatalities.”) (citations omitted). See also *supra* notes 341–44 and accompanying text.

Children are different. Rescue is different. Borrowing from the histories, policies, and constitutional comparisons explored above, the next Part attempts to fashion what the procedural world of rescue ought to look like.

V. BRINGING CONSTITUTIONAL STANDARDS TO BEAR

I have devoted much of this Article to explaining differences between arrest, removal, and commitment. My point is that because the three differ (in terms of history, justifications, and surrounding policies), they each can logically generate unique procedural requirements.

My focus now shifts to what those procedural requirements ought to be in the context of rescue and removal. Borrowing from general Fourth and Fourteenth Amendment standards, I argue that rescue should be preceded by some sort of judicial proceeding. Removal is a seizure for purposes of the Fourth Amendment, and is a deprivation of liberty under the Due Process Clause. Both the Fourth and Fourteenth Amendments generally prefer process before adverse governmental action. Both also recognize that “exigent circumstances”⁴¹⁶ are needed to excuse prior process. In the absence of categorical, exceptional needs—which I argue below do not exist under either the Fourth or Fourteenth Amendments—these general standards ought to be employed in the context of removal.

A. Do “Special Needs” Justify Downward Departure?

Part IV.B argues both that the Fourth Amendment should be applied to rescues and that its requirements can logically diverge from those applied to arrests.⁴¹⁷ In sum, the suggestion is that the Fourth Amendment can properly require more for rescues and removals than for arrests; in particular, that rescues might be subjected to an across-the-board warrant requirement, even though procedures for arrest diverge at the threshold of the home.

If rescue differs from arrest in a meaningful way, as argued above, could it be that the procedures for rescues should be *less demanding* than those for arrests? Might it be constitutionally permissible (and normatively wise) to simply allow summary rescues in all cases, with judicial review to follow? The Supreme Court has recognized for some time that the Fourth Amendment’s requirements can be waived or modified in “administrative” cases. In *Camara v. Municipal Court*,⁴¹⁸

⁴¹⁶ See, e.g., *Mincey v. Arizona*, 437 U.S. 385 (1978) (describing exigent circumstances exception to Fourth Amendment); *United States v. James David Good Real Property*, 510 U.S. 43 (1993) (discussing exigent circumstances exception to Due Process Clause).

⁴¹⁷ See *supra* notes 286–348 and accompanying text.

⁴¹⁸ *Camara v. Mun. Ct.*, 387 U.S. 523, 534 (1967) (holding that diminished probable cause standard applies to safety inspections). The *Camara* Court continued to require warrants for safety inspections. Warrants, however, could be readily obtained under the diminished probable cause standard that was required.

for example, the Court ruled that safety inspections could proceed under a diminished probable cause standard.⁴¹⁹ Subsequent cases extended *Camara*'s rationale and dispensed with the Fourth Amendment's warrant requirement in the context of "closely regulated" businesses and industries.⁴²⁰ Thus, in *New York v. Burger*, the Court ruled that an automotive junkyard was subject to warrantless inspections by police.⁴²¹

The Supreme Court's so-called "administrative exception" quickly spilled outside the banks of safety inspections. From metal detectors and x-ray machines used at airports⁴²² to drunk-driver checkpoints employed during holiday seasons,⁴²³ the administrative exception became a common justification for suspicionless and warrantless searches. Warrantless searches of families, homes, and children, in particular, have been upheld under this exception. In *Wyman v. James*, for example, the Court ruled that welfare recipients could be required to submit to warrantless home visits by social workers.⁴²⁴ In *Griffin v. Wisconsin*, the Court ruled that a probationer's home could be searched without a warrant.⁴²⁵ And in *New Jersey v. T.L.O.*, the Court concluded that high school students were subject to warrantless searches based on evidence that did not amount to probable cause.⁴²⁶

In a concurring opinion in *T.L.O.*,⁴²⁷ Justice Blackmun first coined the term "special needs," which has since displaced the use of the dated and less-

⁴¹⁹ *Camara*, which involved houses, was applied to businesses in *See v. City of Seattle*, 387 U.S. 541, 545-46 (1967) (holding that the fire inspection of a business was subject to same diminished probable cause standard).

⁴²⁰ The Court in *Colonnade Catering v. United States*, 397 U.S. 72, 76-77 (1970), and *United States v. Biswell*, 406 U.S. 311, 317 (1972), held that liquor and firearms businesses, respectively, being heavily regulated, were not governed by *Camara*'s warrant requirement. *See also* *Donovan v. Dewey*, 452 U.S. 594, 600 (1981) (holding that mine inspectors can search without warrant). *Contra* *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 325 (1978) (holding that businesses that are not closely regulated are protected by warrant requirement).

⁴²¹ *New York v. Burger*, 482 U.S. 691, 703-04 (1987) (holding that auto junkyard was subject to warrantless inspection).

⁴²² *See* LAFAVE ET AL., *supra* note 18, at 240-41 (discussing constitutionality of screening devices at airports).

⁴²³ *See* LAFAVE ET AL., *supra* note 18, at 238-40 (discussing validity of vehicle checkpoints).

⁴²⁴ *Wyman v. James*, 400 U.S. 309, 318 (1971) (holding welfare recipients can be subjected to warrantless visits or forfeit benefits).

⁴²⁵ *Griffin v. Wisconsin*, 483 U.S. 868, 872 (1987) (holding probationer's home is subject to warrantless search).

⁴²⁶ *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985) (holding student was subject to search without probable cause).

⁴²⁷ *Id.* at 351 (Blackmun, J., concurring).

informative “administrative exception.”⁴²⁸ The “special needs” terminology was adopted by a majority of Justices two years later,⁴²⁹ and since that time the Court has routinely observed that, “in limited circumstances, a search unsupported by either warrant or probable cause can be constitutional when ‘special needs’ other than the normal need for law enforcement provide sufficient justification.”⁴³⁰ Like the old administrative exception, the “special needs” analysis basically weighs the respective interests of the government and the individual.⁴³¹ Where the governmental interest is “divorced from the State’s general interest in law enforcement”⁴³² and not easily accommodated using the Fourth Amendment’s general terms,⁴³³ the warrant requirement can be dispensed with. Indeed, the government’s special needs can justify dispensing with probable cause and even reasonable suspicion.⁴³⁴

Drug testing provides a useful illustration of how the Court employs the special needs balancing test. In a series of cases, the Supreme Court has ruled that the members of train crews,⁴³⁵ federal Customs agents,⁴³⁶ and high school students⁴³⁷ can be subject to mandatory, suspicionless urinalysis so long as test

⁴²⁸ See *Ferguson v. City of Charleston*, 532 U.S. 67, 74 n.7 (2001) (noting that the “term ‘special needs’ first appeared in Justice Blackmun’s opinion concurring in the judgment in *New Jersey v. T.L.O.*”) (citation omitted).

⁴²⁹ See *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (adopting “special needs” terminology and upholding warrantless search of probationer’s home). See *Ferguson v. City of Charleston*, 532 U.S. 67, 75 n.7 (2001) (noting that the term “special needs” was adopted by a majority in *Griffin*).

⁴³⁰ *Ferguson v. City of Charleston*, 532 U.S. 67, 75 n.7 (2001).

⁴³¹ *Id.* at 78 (observing that the “special needs” test “weighed the intrusion on the individual’s interest in privacy against the ‘special needs’ that supported the program”).

⁴³² *Id.* at 79 (citation omitted).

⁴³³ See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (observing that special needs must render the “warrant and probable-cause requirement impracticable”).

⁴³⁴ See, e.g., *infra* notes 435–51. *Contra* *Chandler v. Miller*, 520 U.S. 305, 322 (1997) (striking down requirement that candidates for office undergo suspicionless drug testing).

⁴³⁵ See *Skinner v. Ry. Labor Executives Ass’n*, 489 U.S. 602, 624 (1989) (holding that, following accidents, train crews can be required to undergo urinalysis even without reasonable suspicion).

⁴³⁶ See *Treasury Employees v. Von Raab*, 489 U.S. 656, 679 (1989) (holding that Customs workers seeking promotions to sensitive positions can be forced to submit to suspicionless urinalysis).

⁴³⁷ See *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 661 (1995) (holding that high school students participating in interscholastic sports can be subjected to suspicionless drug tests); *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 838 (2002) (holding that requiring all students who participated in competitive extracurricular activities to submit to drug testing was a reasonable means of furthering the school district’s important interest in preventing and deterring drug use among its schoolchildren).

results are not intended for criminal law enforcement. In *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*,⁴³⁸ which upheld suspicionless drug testing of all high school students involved in competitive extracurricular activities, the Court emphasized that the testing program was “not in any way related to the conduct of criminal investigations”⁴³⁹ The test results were “not turned over to any law enforcement authority,” nor would they “lead to the imposition of discipline or have any academic consequences.”⁴⁴⁰ The school district’s concern was “detecting and preventing drug use among its students,”⁴⁴¹ rather than punishing them.

Weighed against the school district’s “important,”⁴⁴² non-punitive rationale were the students’ twin interests in privacy and confidentiality.⁴⁴³ While the latter was largely insured by the limited scope of test results’ use—they could not be accessed by law enforcement officials and were kept from the prying eyes of others—the former was preserved by relatively discrete collection techniques. Monitors did not observe tests;⁴⁴⁴ they simply waited outside the “closed restroom stall for the student to produce a sample and [to] ‘listen for the normal sounds of urination. . . .’”⁴⁴⁵ Because high school children are “routinely required to submit to physical examinations and vaccinations against disease,”⁴⁴⁶ and voluntarily agree to diverse invasions in order to participate in after-school programs,⁴⁴⁷ any residual compromise of their privacy concerns was deemed “negligible” by the Court.⁴⁴⁸ The only remaining issue was whether suspicionless urinalysis was a “reasonably effective” tool for “deter[ring] and detecting drug use.”⁴⁴⁹ Finding that suspicionless testing furthers both ends, the Court “question[ed] whether testing based on individualized suspicion . . . would be less intrusive.”⁴⁵⁰ “Such a regime . . . of individualized suspicion might unfairly target members of unpopular groups. The fear of lawsuits resulting from such targeted

⁴³⁸ *Earls*, 536 U.S. at 822, 838 (holding that high school students engaged in extracurricular activities can be required to undergo mandatory, suspicionless urinalysis).

⁴³⁹ *Id.* at 829.

⁴⁴⁰ *Id.* at 833.

⁴⁴¹ *Id.* at 825.

⁴⁴² *Id.*

⁴⁴³ *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 848 (2002).

⁴⁴⁴ *Id.* at 832.

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.* at 830–31.

⁴⁴⁷ *Id.* at 831.

⁴⁴⁸ *Id.* at 833.

⁴⁴⁹ *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 837 (2002).

⁴⁵⁰ *Id.*

searches may chill enforcement of the program, rendering it ineffective in combating drug use.”⁴⁵¹

Ferguson v. City of Charleston, decided the previous Term, stands in stark contrast to *Earls* and the cases it represents.⁴⁵² *Ferguson* addressed a public hospital’s use of drug testing to deter pregnant women from using illegal drugs.⁴⁵³ Urine screens were performed on maternity patients who were thought to be using cocaine. Positive tests were used to “leverage” patients into formal treatment programs.⁴⁵⁴ Patients who refused, or who failed to live up to the treatment program’s terms, were referred to law enforcement officials for possible prosecution.⁴⁵⁵ Potential charges included child neglect and unlawful delivery of a controlled substance to a child.⁴⁵⁶

Because the hospital’s urinalysis program was not “divorced from the State’s general interest in law enforcement,”⁴⁵⁷ but instead used “law enforcement to coerce the patients into substance abuse treatment,”⁴⁵⁸ the Court concluded that it did not qualify for treatment under the special needs exception. “[A]ll the available evidence” demonstrated that the hospital’s “primary purpose” was “indistinguishable from the general interest in crime control.”⁴⁵⁹ Local “prosecutors and police were extensively involved in the day-to-day administration of the policy.”⁴⁶⁰ Police coordinated arrests with hospital staff.⁴⁶¹ Even though the hospital’s motives were otherwise “benign”⁴⁶² and addressed “a serious problem,”⁴⁶³ the program’s “pervasive involvement” with law enforcement rendered it unqualified for the special needs exception.⁴⁶⁴ “[T]he gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose.”⁴⁶⁵

⁴⁵¹ *Id.*

⁴⁵² *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

⁴⁵³ *Id.* at 70.

⁴⁵⁴ *Id.* at 72.

⁴⁵⁵ *Id.* at 72–73.

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.* at 79.

⁴⁵⁸ *Ferguson v. City of Charleston*, 532 U.S. 67, 80 (2001).

⁴⁵⁹ *Id.* at 81 (citation omitted).

⁴⁶⁰ *Id.* at 82.

⁴⁶¹ *Id.*

⁴⁶² *Id.* at 85.

⁴⁶³ *Id.* at 86.

⁴⁶⁴ *Ferguson v. City of Charleston*, 532 U.S. 67, 85 (2001).

⁴⁶⁵ *Id.* at 86 (citation omitted).

States that have abandoned warrants in the child abuse context—like Florida—commonly argue the special needs exception.⁴⁶⁶ As in *Earls*, they claim that warrants interfere with their important interests in protecting children.⁴⁶⁷ No one, of course, contests the government's compelling concern over child abuse and neglect. Nor can anyone argue about the fundamental rights of parents to care for and protect their children.⁴⁶⁸ Given the weighty loads on both sides of the scale, it is questionable whether any meaningful insight can be garnered through simple, straight-up balancing. Answers are instead more likely to be found in the character of child abuse investigations and effectiveness of warrantless rescues.

As demonstrated by *Ferguson*, the Court presumes that searches motivated by law enforcement purposes should be governed by law enforcement standards, which generally require some level of suspicion.⁴⁶⁹ Along these same lines, child abuse investigations that further law enforcement aims should be subjected to basic law enforcement standards; at least they should not be excused outright.⁴⁷⁰ The question then is whether child abuse investigations are designed to further the objectives of law enforcement.

Unlike in *Ferguson*, where criminal prosecutions were used to leverage treatment,⁴⁷¹ child abuse investigations (and resulting rescues) proceed along a more ambiguous path. *Doe v. Kearney* demonstrates that children can be rescued without prosecutors later filing corresponding criminal charges against parents.⁴⁷² Still, child abuse investigations are not divorced from law enforcement either. Unlike the urinalysis program sustained under the special needs exception in *Earls*,⁴⁷³ rescue is often entwined with law enforcement. Conclusions drawn from child abuse investigations commonly form the bases for criminal charges. Even when criminal charges are not filed, caseworker findings can make their way into official law enforcement reports, like criminal rap sheets.⁴⁷⁴ Further insinuating

⁴⁶⁶ See, e.g., *Roska v. Peterson*, 328 F.3d 1230, 1242 (10th Cir. 2003) (rejecting Utah's argument that special needs justified its abandonment of the warrant requirement); *Walsh v. Erie County Dep't of Job & Family Servs.*, 240 F. Supp. 2d 731, 751 (N.D. Ohio 2003) (rejecting Ohio social workers' claim that special needs justified abandonment of warrant requirement).

⁴⁶⁷ *Roska*, 328 F.3d at 1241–42.

⁴⁶⁸ See *supra* notes 256–65 and accompanying text.

⁴⁶⁹ *Ferguson*, 532 U.S. at 67.

⁴⁷⁰ As argued below, child rescues should be judged under even more protective Fourth Amendment standards. See *infra* notes 497–513 and accompanying text. My point here is that if investigations and rescues are designed to further law enforcement ends, they should *at least* be subjected to the same minimal standards.

⁴⁷¹ See *supra* notes 452–65 and accompanying text.

⁴⁷² See *supra* notes 93–130 and accompanying text.

⁴⁷³ See *supra* notes 438–51 and accompanying text.

⁴⁷⁴ John Doe's Florida Department of Law Enforcement (FDLE) report, for example, included DCF's unsubstantiated claim that he had abused a young boy in 1995. See *Doe v.*

law enforcement into abuse investigations is the common practice of enlisting the aid of police to facilitate rescues. The caseworker in *Doe*, for example, called and waited for the assistance of Hillsborough County sheriffs before proceeding to the Doe residence.⁴⁷⁵ This is an understandable practice, given the propensity of parents to forcibly resist turning their children over to strangers.⁴⁷⁶

Given that “[n]one of [the Court’s] special needs precedents has sanctioned the routine inclusion of law enforcement . . . to implement the system designed for the special needs objectives,”⁴⁷⁷ a strong argument can be made that child abuse investigations (and rescues) simply do not qualify for special needs treatment. The Tenth Circuit’s rejection of the special needs exception in the context of home rescues thus appears imminently reasonable.⁴⁷⁸

Even assuming that rescues are sufficiently divorced from law enforcement for purposes of the special needs exception, there is some question over the need for warrantless rescues and their overall effectiveness. The Eleventh Circuit in *Doe v. Kearney* identified several problems raised by the Fourth Amendment’s warrant requirement: first, prior process would impose “a new and onerous burden on child welfare agencies, many of which already operate under considerable strain,”⁴⁷⁹ second, it would jeopardize child safety;⁴⁸⁰ and third, it might discourage social workers from acting.⁴⁸¹

Although similar arguments proved effective in *Earls*,⁴⁸² which held that suspicionless drug testing of high school students was justified by special needs,

Kearney, No. 8:00-CV-184-T-26B (transcript of hearing, held on June 18, 2001, 176–82) (on file with author). The caseworker, O’Brien, then relied on this unsubstantiated allegation to support her conclusion that Doe had a history of molesting children. *See supra* notes 100–14 and accompanying text.

⁴⁷⁵ *See supra* note 105 and accompanying text.

⁴⁷⁶ Several counties’ sheriffs’ offices in Florida, moreover, have been granted the power to perform DCF’s investigative functions, exclusive of DCF’s interference. *See Fla. Stat. ch. 39.3065(1) & (3)* (mandating that DCF transfer investigative authority to several counties’ sheriffs’ departments). The special needs exception would appear particularly inapplicable in situations where police directly administer the program.

⁴⁷⁷ *Ferguson v. City of Charleston*, 532 U.S. 67, 88 (2001) (Kennedy, J., concurring).

⁴⁷⁸ *See Roska v. Peterson*, 328 F.3d 1230, 1242 (10th Cir. 2003) (holding that warrantless rescue of child from home cannot be justified using special needs exception). *See also Walsh v. Erie County Dep’t of Job & Family Servs.*, 240 F. Supp. 2d 731, 751 (N.D. Ohio 2003) (holding that warrantless search of home for signs of child abuse cannot be justified by special needs exception).

⁴⁷⁹ *Doe v. Kearney*, 329 F.3d 1286, 1295 (11th Cir. 2003).

⁴⁸⁰ *Id.* at 1293 (“[T]he State has a profound interest in the welfare of the child.”).

⁴⁸¹ *Id.* at 1297 (“In terms of litigation, individual liability and damages, an error on the side of removal is risky, while an error on the other side is safe.”) (quoting *Tenenbaum v. Williams*, 193 F.3d 581, 611 (2d Cir. 1999) (Jacobs, J., dissenting)).

⁴⁸² *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 829 (2002). The Supreme Court in *Earls* was obviously concerned about the welfare of

they are not as appealing in the context of rescue. The last of these alleged special needs—overdeterrence—is a constant in constitutional litigation, one that to a large degree is mitigated by the availability of qualified immunity.⁴⁸³ Still, it came to the forefront in *Earls* because of the large measure of discretion afforded government officials by the “reasonable suspicion” standard. Forced to choose between suspicionless and suspicion-based standards, the Court in *Earls* understandably wondered whether the latter might cause more mischief than good.⁴⁸⁴ Armed with discretion, the Court observed, government officials might target unpopular groups.⁴⁸⁵ This would inevitably lead to litigation, which could in the end “chill enforcement.”⁴⁸⁶

In contrast to the choice presented in *Earls*, the choice put to caseworkers is between prior judicial authorization and summary action. While demanding prior judicial authorization will discourage caseworkers from rescuing some children—indeed, that is one of prior process’s values—it also supplies abuse investigators with an almost-absolute shield from liability.⁴⁸⁷ This shield ought to ameliorate the problem of overdeterrence. Only when they act without prior judicial protection are investigators at risk. Armed with warrants, investigators should prove optimally emboldened and encouraged to act.

Of all the justifications set out by the Eleventh Circuit in *Doe*, the most credible is that requiring warrants could strain child welfare systems with “new and onerous” burdens.⁴⁸⁸ Were this to happen, child safety could be jeopardized, which would in turn give credence to the need for an exception. The problem with the charge, however, is that a large number of states continue to successfully operate under systems requiring prior judicial authorization.⁴⁸⁹ Indeed, Florida required court orders for over twenty years.⁴⁹⁰ Prior process is hardly a novel concept. Given the dearth of evidence suggesting that prior process is generally

high school students in light of the national problem with illicit drugs. *See id.* at 834 (“[T]he nationwide drug epidemic makes the war against drugs a pressing concern in every school.”). It also expressed its concern with overdeterrence: “A program of individualized suspicion might unfairly target members of unpopular groups. The fear of lawsuits resulting from such targeted searches may chill enforcement of the program, rendering it ineffective in combating drug use.” *Id.* at 837.

⁴⁸³ *See* John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 85 (1989).

⁴⁸⁴ *Earls*, 536 U.S. at 841–42.

⁴⁸⁵ *Earls*, 536 U.S. at 837.

⁴⁸⁶ *Id.*

⁴⁸⁷ *See* *Malley v. Briggs*, 475 U.S. 335, 344–45 (1986) (holding that police who execute warrants are generally entitled to immunity).

⁴⁸⁸ *Doe v. Kearney*, 329 F.3d 1286, 1295 (11th Cir. 2003).

⁴⁸⁹ *See supra* notes 22–29 and accompanying text.

⁴⁹⁰ *See supra* note 52–64 and accompanying text.

impractical in the child abuse context,⁴⁹¹ or that warrants cause debilitating delays and exacerbate injuries, it would seem that the “onerous burden” argument is speculative and exaggerated.⁴⁹²

The ultimate issue, of course, is how to best protect children. Although summary rescue offers one approach, I am not convinced it is any more effective than generally conditioning rescues on warrants. Granted, summary rescue enjoys the advantage of volume. This advantage, however, is also a curse. It translates into more mistakes, which, in turn, result in more children being needlessly placed in foster care.⁴⁹³ Citing a lack of the “stable, nurturing care they need,”⁴⁹⁴ as well as “a much greater risk of maltreatment than are children in the population at large,”⁴⁹⁵ one commentator has concluded that “it can no longer be presumed that removal of a poor child from a home necessarily serves the state’s avowed interests in child protection.”⁴⁹⁶ Unlike the threat of random urinalysis, which generally deters illicit drug use, it is by no means plain that the twin threats of summary rescue and foster care encourage better parenting.

B. Does Rescue Require More?

The previous section argued that special needs do not justify dispensing with the Fourth Amendment’s warrant requirement. Rejection of the special needs doctrine, however, does nothing more than establish that rescues are subject to the general processes of the Fourth Amendment. While this means that a child’s rescue from his home must be judicially authorized, it does not necessarily mean that rescues initiated outside the home must be similarly approved. Arrests outside the home, after all, need not be accompanied by warrants, even when time

⁴⁹¹ Telephonic warrants, after all, are available in many states, including Florida. *See, e.g.,* Kalmanson v. Lockett, 848 So. 2d 374, 379 (Fla. Dist. Ct. App. 2003) (“It is not unusual, however, for trial court judges to be contacted by telephone by law enforcement officials seeking, for example, consideration of an emergency search or arrest warrant or a temporary injunction to prevent domestic violence.”).

⁴⁹² Children, moreover, can be summarily rescued notwithstanding a general warrant requirement. Faced with exigent circumstances, caseworkers need not await prior judicial approval. The warrant process will often only shift a social worker’s attention from bureaucracy to the judiciary. In *Doe*, for example, the social worker could have devoted the three-plus hours she used clearing the matter with DCF attorneys and waiting for deputy sheriffs to phoning a judge. *See supra* notes 93–114, 491. The only real difference is that sometimes warrants will not be forthcoming. But that is the very reason for warrants.

⁴⁹³ *See supra* notes 73–82 and accompanying text.

⁴⁹⁴ Kay P. Kindred, *Of Child Welfare and Welfare Reform: The Implications for Children When Contradictory Policies Collide*, 9 WM. & MARY J. WOMEN & L. 413, 462 (2003).

⁴⁹⁵ *Id.* at 463.

⁴⁹⁶ *Id.* at 468–69. “[E]xisting evidence supports the conclusion that foster care, at least as it currently exists and operates, often is quite harmful to children and, generally, may have more harmful consequences for children than leaving the child in the home.” *Id.* at 469–70.

would easily accommodate the application process.⁴⁹⁷ Should rescue be treated differently? Should rescue generally demand prior judicial authorization regardless of location?

Without recounting removal's checkered past, it is sufficient at the outset to note that rescue's pedigree instills little implicit trust. Children were removed because of poverty long before they were rescued because of abuse.⁴⁹⁸ Indeed, some still complain about the welfare/protection system's class-based bias.⁴⁹⁹ History, more than anything else, teaches that governmental meddling with families ought to be viewed with a healthy dose of skepticism.

More importantly, the child abuse system today experiences a significant error rate. Vague standards,⁵⁰⁰ large turnover,⁵⁰¹ poor training,⁵⁰² and overzealous reporting requirements conspire to cause needless rescues. Professor Richman, a noted expert on child abuse, has observed that the "most startling fact about child-abuse reporting numbers, beyond their size, is that most of the reports remain unsubstantiated—that is, they are not substantiated after caseworker investigation."⁵⁰³ On average, "60% to 65% of [the] cases [are] *not substantiated*."⁵⁰⁴

Even assuming that no physical rescue or ultimate removal takes place, summary investigations risk unintended, adverse consequences.

⁴⁹⁷ See *supra* notes 306–09 and accompanying text.

⁴⁹⁸ See *supra* notes 179–222 and accompanying text.

⁴⁹⁹ See, e.g., Kindred, *supra* note 494, at 491 (observing that "poverty is a common characteristic of families charged with maltreatment, particularly neglect, and removal is a common response of child protective agencies").

⁵⁰⁰ See *supra* notes 333–40 and accompanying text.

⁵⁰¹ See *supra* notes 345–47 and accompanying text.

⁵⁰² See *supra* notes 345–47 and accompanying text.

⁵⁰³ Richman, *supra* note 65, at 223.

⁵⁰⁴ Richman, *supra* note 65, at 223. Professor Richman points to Illinois as an example, where "one-half of the reports were *not* substantiated in 1985; by 1989 the proportion had risen to 63%, and in 1997 it was 65%. These last two figures are essentially the same as the estimates of the national average, where we consistently have 60% to 65% of cases *not substantiated*." *Id.* The U.S. Department of Health and Human Services' Administration for Children and Families corroborates Professor Richman's findings. Of the almost 275,000 children *removed* from their homes in 2001, more than 100,000—fully one-third—were found to be "non-victims." See U.S. Dept. of Health and Human Services Factsheets/Publications, http://www.acf.dhhs.gov/programs/cb/publications/cm01/table6_5.htm (last visited Oct. 6, 2004). See also Chill, *supra* note 39, at 541. If *removal* is wrong one-third of the time, emergency *rescue* surely experiences a larger rate of error.

Can you imagine the impact on familial relationships, on the family's view of itself, and on the view of the family held by those consulted in the investigation? We cannot be right 100% of the time in such matters, but when we are right only 33% of the time, the situation may be as damaging, or more damaging, than the problem.⁵⁰⁵

Further, the risk of removal may lead parents to avoid needed assistance. How many parents forego trips to doctors and hospitals because they fear removal?

All of this assumes, of course, that judges' *ex ante* review mitigates these concerns by reducing the overall risk of error and minimizing the number of removals. Common sense suggests that it does. Consider Florida, where judges *ex post* have tended to ratify more than ninety-seven percent of governmental rescues.⁵⁰⁶ This *fait accompli* phenomenon can only be understood as a judicial hesitance to upset the status quo. Faced with rescues that have already taken place, moreover, judges would rather err on the side of extreme caution. In an *ex post* setting, these tendencies reinforce one another. The result is uniform acceptance of rescues by the judiciary. These same judicial tendencies, however, will likely tug against one another when review is had *ex ante*.⁵⁰⁷ Judges' natural inclination to err in favor of rescue will be offset by their unwillingness to upset the status quo, parental custody. Simply put, judges are less likely to act like rubber stamps when doing so will *cause* a child's immediate removal from its family.

Further, as observed by Professor William Stuntz, the warrant process deters executive officials from pursuing marginal cases, which can prevent bad searches and seizures and thereby reduce the system's relative risk of error.⁵⁰⁸ Even if judges grant warrants and ratify rescues at identical rates, requiring warrants in the first place ought to reduce the number of errors.⁵⁰⁹ This self-policing feature of the warrant requirement pays added dividends in states, like Florida, that offer few (if any) post-rescue remedies.⁵¹⁰ When executive officials know that their

⁵⁰⁵ Richman, *supra* note 65, at 223.

⁵⁰⁶ See *supra* notes 79–92 and accompanying text.

⁵⁰⁷ See Stuntz, *supra* note 40, at 915 (observing a common judicial bias in the context of *ex post* review of searches and seizures); Chill, *supra* note 39, at 543–45 (describing judicial bias against *returning* children to parents).

⁵⁰⁸ Stuntz, *supra* note 40, at 891 (observing that the warrant process “forces police officers to go to some substantial trouble before engaging in searches (thereby encouraging them not to do so without good reason)”).

⁵⁰⁹ Stuntz, *supra* note 40, at 891.

⁵¹⁰ I have noted elsewhere the difficulty of overcoming qualified immunity in the Eleventh Circuit, where Florida is located. See Mark R. Brown, *The Failure of Fault Under § 1983: Municipal Liability for State Law Enforcement*, 84 CORNELL L. REV. 1503, 1511 n.52, 1512 (1999). *Doe v. Kearney*, 329 F.3d 1286 (11th Cir. 2003), provides another obvious example. The District Court in *Doe* concluded that the social worker, O'Brien, was entitled to qualified immunity because she had “arguable probable cause” to believe the Doe children had

likelihood of liability for obvious mistakes approaches zero, they have little incentive to police themselves. It is in this atmosphere that warrants prove particularly useful.⁵¹¹

My assumption has been that there is little downside to the warrant requirement. The volume of removal will decrease, which will likewise reduce the number of erroneous rescues. I am not so naïve as to believe that the tradeoff is that simple. Reduced volume might also reduce the frequency of detected abuse. The warrant process might not only screen out false positives, it might also screen out true wrongs. Fortunately, the Fourth Amendment's warrant requirement is not an absolute. Warrants are excused by exigent circumstances, facts that make it difficult or impossible to timely obtain a warrant.⁵¹² A child

been abused. Notwithstanding that a state court had found no probable cause, it accordingly granted judgment as a matter of law to the defense. On appeal, the Eleventh Circuit went one step further and concluded that O'Brien had actual probable cause to rescue the Doe children. Not only did the court ignore the state court's conclusion to the contrary and go further than even the District Court dared to go, it ignored settled principles of law and usurped the role of the jury in order to protect O'Brien. It also concluded that the Does had consented to O'Brien's entry of their home, even though the Does steadfastly denied that they had. When reviewing a judgment as a matter of law, of course, the court is to draw all reasonable inferences in favor of the losing party. The Eleventh Circuit, which notoriously defends and immunizes government officials' abusive actions, went well beyond accepted bounds to insulate O'Brien. *Contra* Walsh v. Erie County Dep't of Job & Family Servs., 240 F. Supp. 2d 731, 748 (N.D. Ohio 2003) (rejecting social workers claim at summary judgment stage that parents had consented to warrantless entry of their home in order to search for evidence of child abuse).

⁵¹¹ See Stuntz, *supra* note 40, at 909 ("warrants can serve as a useful, if partial, corrective for the set of incentives problems that damages remedies engender").

⁵¹² See, e.g., *Mincey v. Arizona*, 437 U.S. 385, 393–94 (1978) (holding that exigent circumstances dispense with warrant requirement). The Court in *Mincey* refused to concede that arrests for serious offenses inside the home are automatically justified by exigent circumstances: "We decline to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search." *Id.* at 394. Instead, the Court concluded that time is the touchstone of exigency. Exigent circumstances did not exist in *Mincey* because "[t]here was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant. . . . And there is no suggestion that a search warrant could not easily and conveniently have been obtained." *Id.* "Many lower courts utilize the list of 'considerations' set out in *Dorman [v. United States]*, 435 F.2d 385 (D.C. Cir. 1970)" to assess exigent circumstances. LAFAVE ET AL., *supra* note 18, at 190. Judge Leventhal described seven considerations in *Dorman*: First, whether a "grave offense" was involved; second, whether the suspect was "reasonably believed to be armed;" third, whether "a clear showing of probable cause" existed; fourth, whether a "strong reason to believe that the suspect is in the premises" existed; fifth, the likelihood that the suspect would "escape if not swiftly apprehended;" sixth, whether the entry could be made "peaceably;" and last, whether the entry was made at night. 435 F.2d at 392–93. The Court has since ruled that warrantless arrests inside the home for relatively minor offenses ordinarily cannot be justified by exigent circumstances. See *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984) (holding that fresh pursuit exception did not apply to drunk driving).

immediately in harm's way can be summarily rescued, consistent with the Fourth Amendment. While not a panacea, the Fourth Amendment's warrant/exigent circumstances dichotomy seems to strike a sound compromise.

Viewed through this prism, distinguishing rescues that take place outside the home from those that occur inside the home makes little sense. Rescue's error rate would not seem to vary based on location. The harm caused to parents and children, moreover, would appear to be constant. Granted, heightened privacy interests inside the home render home invasions particularly egregious. Taking children from their schools or playgrounds without their parents' knowledge, however, can be even more traumatic. In the *Doe* case, for example, D.M.'s parents were thrown into a panic when she did not return from school on time.⁵¹³ In today's climate of kidnappings, molestations, and murders, inflicting uncertainty of this sort on parents ought to be avoided whenever possible. While warrants can not fully solve this problem, they should help minimize it.

C. Unraveling Due Process

The Fourth Amendment does not pose the only stumbling block to summary rescues. Prior process is also preferred by the Fourteenth Amendment's Due Process Clause.⁵¹⁴ Because parental rights are clearly "liberty," the argument is that they can only be interrupted *after* some sort of hearing.⁵¹⁵ Like the Fourth Amendment, procedural due process admits exceptions. Process can be delayed, and even modified, under the balancing test set forth in *Mathews v. Eldridge*,⁵¹⁶ which weighs three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁵¹⁷

Using variations on this test, the Supreme Court has concluded that common law remedies (which *follow* wrongs) can satisfy procedural due process under certain, unusual circumstances.⁵¹⁸ More often, the Court has found that statutorily

⁵¹³ See *supra* notes 101–04 and accompanying text.

⁵¹⁴ See *supra* note 46 and accompanying text.

⁵¹⁵ See *supra* notes 256–85 and accompanying text.

⁵¹⁶ *Mathews v. Eldridge*, 424 U.S. 319 (1976) (holding that disability hearing can be postponed until after termination of benefits).

⁵¹⁷ *Id.* at 335.

⁵¹⁸ See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 682 (1977) (concluding that, in light of common law remedies, a hearing is not needed before corporal punishment in schools); *Parratt*

created post-deprivation process proves sufficient. Hence, in *Ewing v. Mytinger & Casselberry, Inc.*, the Court ruled that misbranded drugs could be summarily seized in light of detailed post-deprivation processes spelled out in the federal Food, Drug, and Cosmetic Act.⁵¹⁹ In *Fahey v. Mallonee*, the Court similarly held that bank assets could be summarily seized by federal officials pending a hearing.⁵²⁰

These cases recognize that either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process.⁵²¹

Cases like *Ewing* and *Fahey* create categorical exceptions to the general pre-deprivation process requirement. The Court did not ask whether particular facts or circumstances prevented prior hearings.⁵²² Because federal statutes authorized summary seizures across-the-board,⁵²³ the Supreme Court's analyses and conclusions were likewise broad. The Court concluded that temporary seizures of drugs and bank assets, respectively, were always valid, so long as they were followed by the procedures prescribed.⁵²⁴

This does not mean that exceptions to pre-deprivation process are always categorical. Sometimes only fact-specific exceptions—requiring that government officials prove “necessity” or “emergency” in each case—have been recognized. *United States v. James Daniel Good Real Property* is illustrative.⁵²⁵ There, federal officials used a warrant to seize real estate they believed was connected with illicit drugs. Because they had complied with the Fourth Amendment, the officials first argued there was no need to analyze the case under the Fourteenth Amendment's Due Process Clause.⁵²⁶ The Court disagreed. Unlike criminal

v. Taylor, 451 U.S. 527, 541 (1981) (holding that common law tort remedies satisfy procedural due process when wrong is “random and unauthorized”).

⁵¹⁹ *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (holding that drugs can be summarily seized and destroyed).

⁵²⁰ *Fahey v. Mallonee*, 332 U.S. 245 (1947) (holding that bank assets can summarily seized).

⁵²¹ *Parratt v. Taylor*, 451 U.S. 527, 539 (1981) (holding that post-deprivation remedies can satisfy procedural due process when the wrong is “random and unauthorized”).

⁵²² *Ewing*, 339 U.S. at 596; *Fahey*, 332 U.S. at 253–54.

⁵²³ *Fahey*, 332 U.S. at 250–54.

⁵²⁴ *Ewing*, 339 U.S. at 600; *Fahey*, 332 U.S. at 250–54.

⁵²⁵ *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) (holding that summary seizure of real estate in the absence of exigent circumstances violates procedural due process).

⁵²⁶ *Id.* at 49.

cases, where the Fourth Amendment's procedural requirements are exclusive,⁵²⁷ the Court ruled that both the Fourth and Fourteenth Amendments apply to forfeitures.⁵²⁸ In fact, the Fourteenth Amendment, it concluded, demands more.⁵²⁹

Applying the *Mathews* balancing test, the Court in *Good* first found that the nature of the private right involved, control over one's home, "is a private interest of historic and continuing importance."⁵³⁰ Next, noting that forfeiture often turns on the owner's innocence, the Court found that uncontested, *ex parte* hearings (and the seizures that ensue) present an unacceptably large risk of error. Unlike misbranded drugs and bank failures, which present relatively objective problems, a home owner's subjective innocence is often difficult to assess.⁵³¹ "Moreover, the availability of a postseizure hearing . . . [g]iven the congested civil dockets in federal courts . . . may not [materialize] . . . until many months after the seizure."⁵³² Return of the property at this late juncture, "coming months after the seizure, 'would not cure the temporary deprivation that an earlier hearing might have prevented.'"⁵³³

Turning to the government's concerns, the Court rejected the claim that the balance under *Mathews* hinged on the government's "general interest in forfeiting property."⁵³⁴ The government's interest, it concluded, was in "seizing real property before the forfeiture hearing."⁵³⁵ By focusing on timing as opposed to substance, the Court shifted the inquiry to whether less restrictive alternatives existed for *securing* potentially forfeitable property. "In the usual case," the Court observed, "the Government . . . has various means, short of seizure, to protect its legitimate interests in forfeitable real property."⁵³⁶ Only in unusual situations, those where government can establish that "less restrictive measures—*i.e.*, a *lis*

⁵²⁷ See *supra* notes 293–97 and accompanying text.

⁵²⁸ *Good*, 510 U.S. at 43–44.

⁵²⁹ *Good*, 510 U.S. at 52. See *supra* notes 298–348 and accompanying text (arguing that both the Fourth and Fourteenth Amendments apply to rescues and that their standards might vary).

⁵³⁰ *Good*, 510 U.S. at 53–54.

⁵³¹ *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55 (1993) ("The *ex parte* preseizure proceeding affords little or no protection to the innocent owner.").

⁵³² *Id.* at 56

⁵³³ *Id.*

⁵³⁴ *Id.*

⁵³⁵ *Id.*

⁵³⁶ *Id.* at 59. Contrast forfeitures of personal property, which commonly are met by exigent circumstances, such as a likelihood of removal from the jurisdiction, surreptitious transfer, or ultimate destruction. These possibilities justify warrantless seizures of personal property outside the home under almost all circumstances. See *Florida v. White*, 526 U.S. 559 (1999) (holding that warrantless seizure of car connected to crime satisfies Fourth Amendment).

pendens, restraining order, or bond—would not suffice to protect the Government's interests in preventing the sale, destruction, or continued unlawful use of the real property,"⁵³⁷ are *ex parte* proceedings appropriate. In the absence of these specific "exigent circumstances,"⁵³⁸ full pre-deprivation process is still the rule.

Good's logic points to a similar conclusion in the context of child abuse. Parents plainly have important rights at stake. Government's interest, meanwhile, is not generally protecting children. Rather, its interest (for purposes of *Mathews*' balancing test) lies in protecting children in the short time before a termination or shelter hearing can be held. As in *Good*, government has a variety of mechanisms at its disposal to monitor child safety short of summary removal. Where flight or imminent abuse is threatened, *ex parte* process can be used. Interviews and home inspections can ensure safety in many instances.

In either case, whether temporary shelter or a permanent termination of parental rights, parental fault is the paramount concern. As the Court observed in *Good*, fault and innocence are not easily established.⁵³⁹ Summary process has a large margin of error in this context. Given the magnitude of the temporary harm, which can never be cured, government ought to explore other means, short of summary rescue, to protect children while termination is pending. Indeed, *Good* indicates that government should apply for prior judicial assistance whenever possible.⁵⁴⁰ It should act summarily only when absolutely necessary, and only when specific facts truly point to an emergency.

Good, of course, goes so far as to require prior contested hearings whenever possible.⁵⁴¹ While this conclusion seems generally agreeable in the child abuse context, the risk of parents' flight following notice—which is rarely a problem in the context of real estate forfeitures—may sometimes excuse the need for contested hearings. Under these circumstances, *ex parte* hearings are all that can be expected. Without delving into precisely when *ex parte* hearings are enough, it is sufficient here to state that *some form* of prior judicial process is generally necessary to satisfy due process. Only specific, emergent circumstances can justify summary rescue. When time reasonably suffices—that is, a reasonable person would believe that prior judicial authorization would not jeopardize the safety of the child—court orders should be sought.

⁵³⁷ *United States v. James Daniel Good Real Property*, 510 U.S. 43, 62 (1993).

⁵³⁸ *Id.*

⁵³⁹ *Id.* at 56.

⁵⁴⁰ *Id.* at 58.

⁵⁴¹ *Id.* at 53.

VI. CONCLUSION

Everyone agrees that children should be protected. The question is how best to protect. For unknown and innumerable reasons, parents sometimes abuse their children. That fact is beyond doubt. Often forgotten, however, is that governmental intrusions also injure children. Removal in many instances causes severe psychological and emotional trauma. In others, removal leads to physical institutional abuse. Rather than a panacea, rescue can be an affliction all by itself.

Society embraces the fact that most—indeed, a vast majority of—children are better off in the care of their parents. Parents have biological and emotional incentives to protect their offspring, feelings that are not naturally shared by strangers and governments. Like it or not, government is simply not as good at protecting children as are parents. Even if it were, government would not be financially capable of caring for all children. Parental care is both a reality and a necessity.

This Article is not designed to resolve the age-old dilemma of *what* justifies governmental intervention into familial affairs. My objective is more limited. I offer only advice on *how* governmental intervention should proceed. Given the natural presumption favoring parental discretion and government's bounded role, it seems that interdiction should be exceptional, focused, and certain. Even when horrific allegations are made against parents—like those made against John Doe⁵⁴²—families should enjoy a presumption of regularity. Proof of abuse must rise above the conjecture and hysteria that often accompany charges of sexual molestation. Factual circumstances ought to at least convince a neutral magistrate that drastic action is warranted.

I recognize that the post-deprivation model endorsed by several states,⁵⁴³ including Florida, has emotional appeal. Concerns over structural principles are easily dismissed in favor of child safety. "Protect the child" is an irresistible mantra. Rescue, however, has risks. It inflicts pain and causes enormous suffering. It has an ambiguous past that instills pride in few Americans.⁵⁴⁴ Even in today's enlightened environment, the merits of governmental intrusion are hotly debated.⁵⁴⁵ Rather than an "all costs" moral imperative, I see rescue and removal as medicines best prescribed in relatively small doses.

History, corroborated by Florida's recent experience, teaches that executive power seldom limits itself. Police officers abide by the Fourth Amendment because they risk exclusion of evidence in criminal courts. Were it not for this

⁵⁴² See *supra* notes 93–94 and accompanying text.

⁵⁴³ See *supra* notes 30–38 and accompanying text.

⁵⁴⁴ See *supra* notes 179–255 and accompanying text.

⁵⁴⁵ See, e.g., Davidson, *supra* note 13; Richman, *supra* note 65; Chill, *supra* note 39.

possibility,⁵⁴⁶ police searches would surely exceed present bounds. The same holds for social workers in child abuse cases. Faced with no need for prior judicial approval, no exclusionary rule,⁵⁴⁷ and little chance of being held personally liable should probable cause prove lacking,⁵⁴⁸ case workers have little incentive to exercise caution. In the absence of a genuine threat of personal liability, pre-rescue review would appear to offer the only viable deterrent.

I recognize that pre-rescue process is not cost-free. Due process can be expensive. Putting dollars and cents aside, due process can also be expected to sometimes, but not always,⁵⁴⁹ delay the rescue of an abused or neglected child. When this happens—and when the resulting delay causes more or aggravated abuse—both the abused child and society suffer. This potential combination's likelihood, however, is too easily overstated. Dispensing with Florida's warrant

⁵⁴⁶ Unfortunately, it appears that in terms of searches and seizures this is the only true deterrent. Police officers are rarely held civilly liable for violating the Fourth Amendment. *See* Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. L. REV. 1297, 1311–12 (2000) (describing the many problems with recovering money damages from police officers for unlawful arrests).

⁵⁴⁷ The Fourth Amendment's exclusionary rule generally has no application in civil matters, *see* LAFAVE ET AL., *supra* note 18, at 119 (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (holding that exclusionary rule does not apply to deportation proceeding)), including those involving a termination of parental rights. *See* Ellen Marcus, *Crack Babies and the Constitution: Ruminations About Addicted Pregnant Women After Ferguson v. City of Charleston*, 47 VILL. L. REV. 299, 330 n.182 (2002) (“even though a civil abuse and neglect action can result in a criminal prosecution for child abuse, it would probably not trigger the exclusionary rule”).

⁵⁴⁸ The District Court in *Doe*, remember, found “arguable probable cause” to justify the children’s removal. *See supra* notes 123–25 and accompanying text. The Eleventh Circuit went so far as to find actual probable cause, without any factfinding whatsoever. *See supra* note 130 and accompanying text. Like Florida’s reviewing courts, *see supra* notes 79–82 and accompanying text, federal courts in Florida rarely conclude that probable cause was lacking in the child abuse context. Indeed, courts in Florida are loath to impose liability on social workers even when the social workers manufacture false evidence. *See, e.g., Stark v. McClenathan*, 866 So. 2d 1221 (Fla. Dist. Ct. App. 2003) (affirming without opinion trial court’s award of absolute immunity to social worker who allegedly manufactured evidence to justify rescue of child) (briefs on file with author). *See also Johnson v. Sackett*, 793 So. 2d 20, 24 (Fla. Dist. Ct. App. 2001) (holding that social worker was entitled to absolute immunity). This is not to say that all states and circuits are as reticent as Florida and the Eleventh Circuit. *See, e.g., Snell v. Tunnell*, 920 F.2d 673, 701 (10th Cir. 1990) (holding that social worker who falsely represented facts in affidavit can be held personally liable). The point is that official liability in rescue cases is rare. *See also Tenenbaum v. Williams*, 193 F.3d 581, 596 (2d Cir. 1999) (holding that officials who unconstitutionally rescued child were entitled to qualified immunity); *Roska v. Peterson*, 328 F.3d 1230, 1254 (10th Cir. 2003) (remanding qualified immunity issue to trial court after concluding rescue was unconstitutional).

⁵⁴⁹ When time is plentiful, as in *Doe v. Kearney*, 329 F.3d 1286 (11th Cir. 2003) (described *supra* notes 93–131), resort to pre-deprivation judicial process will not delay rescue at all.

requirement, for example, would not have hastened Kayla McKean's rescue nor saved her life.⁵⁵⁰ Kayla was murdered, after all, not because Florida officials were delayed in seeking a warrant, but because they did not act *at all*.⁵⁵¹ In those instances where delay would appear unreasonably risky, moreover, summary action is appropriate under the exigent circumstances exception. Harm to children thus should rarely be directly attributable to delay caused by a warrant requirement.⁵⁵²

This is not to say that delay or, more likely, an inability to obtain warrants (because probable cause is lacking) can not facilitate harm to children. I suspect police would uncover more crime if they were not constrained by the Constitution. Likewise, investigators are likely to uncover and prevent more abuse if they are given a free rein to search for and seize children. These costs, however, must be balanced against the injuries risked by haste and license. On balance, a proper accommodation dispenses with pre-deprivation process only when absolutely necessary. Faced with exigencies, immediate rescue is in order. Although an *ex ante* process requirement risks some harm, so does its *ex post* counterpart. Unfortunately, calculating which harm is more severe and ought to be avoided is an intractable task. The better course is to follow the teachings of history, which indicate that pre-deprivation process offers the wiser course.

⁵⁵⁰ See *supra* notes 56–58 and accompanying text.

⁵⁵¹ See Fetcher, *supra* note 56.

⁵⁵² Florida's Child Abuse Death Review Team reported in 2003 that 124 children were killed in Florida under abusive circumstances during the four-year period beginning in 1999 and ending in 2002. See Florida Child Abuse Death Review Team, *Florida Child Abuse Death Review: Fourth Annual Report*, Florida Dep't of Health at ii (<http://www.doh.state.fl.us/cms/CADR/2003CADRrpt.pdf>) (Dec. 2003). Because the report's data included only children who had prior involvement with child protection services, the total number of abusive deaths reported was likely quite low. *Id.* at iii-iv. Consequently, it is clear that a substantial number of children in Florida are suffering serious abuse. This does not mean, however, that a warrant requirement will exacerbate the problem. The report also surmised that twenty percent of the deaths were simply not preventable. *Id.* at 3. This means that under either pre- or post-deprivation process models, nothing could be done to save the children. As for the other eighty percent, most had several "risk factors present at the time of death." *Id.* at ii. These risk factors, according to the report, put either DCF or others on notice that problems existed with these children. As with Kayla McKean, the ultimate problem in these instances thus was not delay, it was not acting at all. Of course, this limited data does not include the many children who were killed without any prior involvement with Florida's child protection services. Whether a warrant requirement would have increased or decreased the number is unknown. One commentator has suggested that Florida's "take-the-child-and-run mentality, combined with what was formerly known as the Kayla McKean law, set off a foster care panic and made children less safe." *Death Team Report Shows Failure of 'Take-the-Child-and-Run' Approach to Child Welfare, According to Advocacy Group*, U.S. NEWSWIRE, Jan. 3, 2003, 2003 WL 3726585 (citation omitted). "Even as they tore more children from homes that were safe or could have been made safe with the right kinds of help, they left other children in homes that were dangerous." *Id.*

